Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-677

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, Members of the South Dakota Cement Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

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REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, Members of the South Dakota Cement Commission,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Petitioner prays that Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered on August 7, 1979.

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CITATION TO OPINIONS BELOW

The United States District Court for the Western Division of the District of South Dakota entered a Re-

straining Order dated July 21, 1978, granting petitioner's Request for Injunctive Relief. This Restraining Order is unreported and is printed in Appendix "D" hereto. The opinion of the United States Court of Appeals for the Eighth Circuit, dated November 7, 1978, is printed in Appendix "C" hereto and is reported as *Reeves, Inc. v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978).[1] The memorandum opinion of the United States Supreme Court, dated May 14, 1979, is printed in Appendix "B" hereto and is reported as *Reeves, Inc. v. Kelley,* — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979). The opinion of the United States Court of Appeals for the Eighth Circuit, dated August 7, 1979, is printed in Appendix "A" hereto and is reported as *Reeves, Inc. v. Kelley,* 603 F. 2d 736 (8th Cir. 1979).

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JURISDICTION

The Judgment of the Court of Appeals, printed in Appendix "A" hereto, was entered on August 7, 1979.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

—o—

QUESTION PRESENTED

1. Does the state of South Dakota, which owns and operates a cement plant, and which has for many years

1 This case was consolidated with two other cases on appeal to the U. S. Court of Appeals, Eighth Circuit. Only Reeves, Inc. petitioned for a Writ of Certiorari. See footnote 1 of *Reeves v. Kelley* (1978), *supra,* App. 9.

sold substantial amounts of its product in interstate commerce, violate the Commerce Clause of the United States Constitution by adopting a policy limiting the sale of its cement to South Dakota consumers first before making sales available to non-residents of the State of South Dakota?

—o—

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provision involved is the Commerce Clause of Article I, Section 8, Clause 3 of the Constitution of the United States of America. The statute giving the District Court power to issue the injunction is 28 U. S. C. § 1651 (a). The rules giving the District Court discretion to hear the injunction is Rule 65 of the Federal Rules of Civil Procedure. These provisions are printed in Appendix "G" hereto. Article III, Section 10 of the South Dakota Constitution and *South Dakota Compiled Laws* 5-17-1, 5-17-2, 5-17-2.1 and 5-17-9 are printed in their entirety in Appendix "H" hereto. The Minutes of the South Dakota Cement Commission dated June 1, 1978, are printed in Appendix "E" hereto. The partial Minutes of the South Dakota Cement Commission, dated June 26, 1974, are printed in Appendix "F" hereto.

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BASIS OF JURISDICTION

Jurisdiction of the United States District Court for the District of South Dakota was conferred by 28 U. S. C., § 1331, and 28 U. S. C., § 1443.

STATEMENT

Petitioner is a corporation organized and existing under the laws of the State of Wyoming, with its principal place of business at Buffalo, Wyoming. Petitioner is engaged in the sale of concrete and concrete products and conducts its business in a three-county area located in Sheridan, Johnson and Campbell Counties, Wyoming. Petitioner supplies approximately 54% of the consumers who purchase concrete within its market area. Petitioner receives 100% of its cement, a necessary ingredient in the production of concrete, from outside the State of Wyoming.

Respondents are members of the South Dakota Cement Commission, appointed pursuant to *South Dakota Compiled Laws* 5-17-2 (App. 26-27) to administer and control the South Dakota cement plant at Rapid City. Constitutional authorization for the operation of said plant is conferred by Article XIII, Section 10 of the Constitution of South Dakota (App. 26). The South Dakota Cement Commission and the state cement plant under its control are a principal department of state government. *South Dakota Compiled Laws* 5-17-2.1 (App. 27).

For the last twenty (20) years, since its inception in 1958, petitioner has received 95% of its cement from the South Dakota Cement Commission in Rapid City, South Dakota. Since January 1, 1975, petitioner has purchased from the South Dakota cement plant the following dollar volumes:

1975		$ 871,000.00
1976		824,000.00
1977		1,172,000.00
1978	(to June 30, 1978)	235,000.00

The South Dakota Cement Commission has engaged in interstate commerce. Since the establishment of the state cement plant more than fifty years ago, cement has been manufactured and sold to both consumers residing in the State of South Dakota and consumers residing outside the state of South Dakota. It is the only cement mill in the state of South Dakota. The market area for the sale of cement by the South Dakota Cement Commission to its consumers included the following states in addition to the State of South Dakota: North Dakota, Minnesota, Nebraska, Iowa, Montana, Colorado and Wyoming.

On June 1, 1978, the respondents, acting under color of state law, took the following action:[2]

> "The Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come first serve basis." Minutes of South Dakota Cement Plant, June 1, 1978, p. 3. (App. "E")

When the foregoing policy was instituted there was a serious cement shortage being experienced both nationally and in the South Dakota region. Shortages of cement were caused by a dramatic increase in demand usage in the regular marketing area of the South Dakota cement plant. The sharp increase in demand was also the cause of shortages at neighboring cement manufacturers and in other regions of the United States.

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2 Apparently the policy was first expressed at a meeting of the South Dakota Cement Commission at the state cement plant held on June 26, 1974 (See App. 21). However, management did not enforce the policy until after it was "reaffirmed" on June 1, 1978.

On July 5, 1978, the petitioner dispatched a cement truck from Wyoming to the South Dakota cement plant in Rapid City, South Dakota, and requested that the truck be loaded with cement. The driver of the petitioner's truck was informed that the truck could not be loaded for the reason that petitioner is located and does business outside the State of South Dakota. Petitioner was informed by officials of the respondents that it could not purchase cement at the South Dakota cement plant until all the demands for cement by residents of the state of South Dakota had been met. Because of a continuous cement shortage, the South Dakota Cement Commission refused to sell cement to petitioner.

On July 19, 1978, a civil suit was initiated by petitioner by filing a Complaint in the United States District Court for the District of South Dakota, Western Division. On the same date the petitioner filed a motion for a temporary restraining order and preliminary injunction. On July 21, 1978, the Honorable Andrew W. Bogue entered a restraining order prohibiting the respondents from refusing to serve the petitioner simply because the petitioner was not an entity located within the boundaries of the state of South Dakota and declaring the policy adopted by the respondents a violation of the Commerce Clause and Privileges and Immunities Clause of the United States Constitution. On August 1, 1978, respondents filed their Notice of Appeal (from the restraining order entered July 21, 1978) to the United States Court of Appeals for the Eighth Circuit.

On appeal, the United States Court of Appeals, Eighth Circuit, remanded the cause to the District Court with directions to vacate the injunction granted to the petitioner and to dismiss the Complaint for failure to state a claim for relief. Not applying the Privileges and Immunities Clause, the United States Court of Appeals, Eighth Circuit, concluded that the Commerce Clause does not limit South Dakota's power "to choose whether, to whom, and on what conditions to sell its goods." *Reeves, Inc. v. Kelley,* 586 F. 2d 1230, 1232 (8th Cir. 1978). Such activity was not considered by the Court of Appeals as the type of activity that the Commerce Clause was enacted and intended to prevent. On November 16, 1978, Andrew W. Bogue, United States District Judge, vacated the injunction issued by the District Court on July 21, 1978, and ordered the action dismissed.

On January 31, 1979, Reeves, Inc. filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in the Supreme Court of the United States. On May 14, 1979, the Petition for a Writ of Certiorari was granted and the Judgment of the United States Court of Appeals for the Eighth Circuit was vacated and the case remanded for further consideration in light of *Hughes v. Oklahoma,* 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). *Reeves, Inc. v. Kelley,* — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979).

On remand, the United States Court of Appeals for the Eighth Circuit issued its opinion in which it refused to apply *Hughes v. Oklahoma, supra,* and continued to abide "by our previous holding that the Commerce Clause does not prohibit South Dakota 'from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp.,* 426 U. S. at 810." *Reeves, Inc. v. Kelley,* 603 F. 2d 736 (8th Cir. 1979). The U. S. Court of Appeals distinguished *Hughes*

v. Oklahoma, supra, on the basis that South Dakota had not "attempted" to prevent articles of trade reduced to possession and ownership by private individuals from being shipped and sold in interstate commerce.

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REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it presents far-reaching constitutional issues not previously addressed by this Court concerning the application of the Commerce Clause of the Constitution of the United States to state-owned and state-operated commercial facilities. If the decision below is not a case of first impression before this Court, it is submitted that it is not in accord with previous decisions of this Court in applying the Commerce Clause of the United States Constitution. In either event, this Court should grant review.

A petition for a Writ of Certiorari to a Judgment of the United States Court of Appeals for the Eighth Circuit entered on November 7, 1978, was previously granted in this case by the United States Supreme Court on May 14, 1979, in favor of this petitioner. *Reeves, Inc. v. Kelley,* — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979). After remand, the United States Court of Appeals, Eighth Circuit, entered its judgment on August 7, 1979, reaffirming its earlier judgment of November 7, 1978. The same reasons which applied to granting of the Petition for a Writ of Certiorari of Reeves, Inc., to the November 7, 1978 Judgment of the United States Court of Appeals apply to the granting of this Petition, especially in light of the Court's decision in *Hughes v. Oklahoma,* 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979).

The respondents, members of the South Dakota Cement Commission, an agency of the State of South Dakota, have instituted a policy to prefer all South Dakota residents over out-of-state residents in sales of state-owned and state-produced cement. This action directly discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. The actions taken by the respondents, in preferring South Dakota citizens to all others, under the guise of state law, *South Dakota Compiled Laws,* 5-17-1, is an exercise in economic protectionism plainly prohibited by established constitutional principles developed in a long line of decisions of this Court extending from *Gibbons v. Ogden,* 9 Wheaton 1, 6 L. Ed. 23 (1824) to *Hughes v. Oklahoma, supra.*

The guiding principle that ". . . the State may not promote its own economic advantages by curtailment or burdening of interstate commerce . . ." is one ". . . deeply rooted in both our history and our law." *H. P. Hood & Sons v. Du Mond,* 336 U. S. 525, 532-533, 69 S. Ct. 657, 662, 93 L. Ed. 865 (1949).

The Commerce Clause crystallized the necessity of centralized regulations among the states so ". . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." See *H. P. Hood & Sons v. Du Mond, supra,* 336 U. S. at 539. This Court needs to clearly enunciate this principle as it applies to state-owned and state-produced commodities marketed in interstate commerce by the state.

The August 7, 1979 Judgment of the United States Court of Appeals upholding the actions of the respondents

fails to properly apply the established constitutional principles set forth in *Hughes v. Oklahoma, supra,* and the decisions supporting the *Hughes* case. The Court below distinguished the *Hughes v. Oklahoma* case by claiming that South Dakota neither "attempted" nor "sought" to regulate commerce in the sale of cement. Not only are these conclusions not supported by the record but have little to do with the effect of the actions of the respondents.

The motive or intent of the respondents has little relation to the practical effect of their actions. Petitioner should not be bound by the state's intentions in regulating the sale of cement. See *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928); and *Toomer v. Witsell,* 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). There was an express trade barrier imposed by the resolution adopted by respondents. Whether a state imposes burdens upon interstate commerce by placing restrictions on private individuals and businesses or places restrictions on its own governmental agencies, the effect is the same. The state cannot escape the power of the Commerce Clause by changing the form in which it imposes direct burdens upon interstate commerce. See *Baldwin v. G. A. F. Seelig, Inc.,* 294 U. S. 527, 55 S. Ct. 497, 79 L. Ed. 1032 (1935). All of these concepts are reaffirmed in *Hughes v. Oklahoma, supra,* as this Court concentrated on the purpose and effect of the state action —not artificial and formalistic analysis of ownership and commerce.

The actions of the respondents and the subsequent effects could not be clearer. The western portion of the United States, which includes the State of South Dakota,

was facing a critical shortage of cement. South Dakota owned the only cement mill in South Dakota and served several surrounding states with cement. The South Dakota Cement Plant is governed by a commission, each member appointed by the Governor of South Dakota. After discussing the critical shortage of cement, the South Dakota Cement Commission adopted the following policy at its June 1, 1978, meeting:

> ". . . the Commission re-affirmed its policy of supplying all South Dakota customers first and honor all contract commitments, with the remaining volume allocated on a first come, first serve basis." App. 20.

The United States Court of Appeals, Eighth Circuit, explains this policy as follows:

> "We held that South Dakota was acting in a proprietary capacity in the sale of a product it manufactured and that as such it had the right, as any other entrepreneur, to sell to whomever it chose." 603 F. 2d at 737.

This approach to the question is simplistic and artificial. The policy adopted by the Commission is not simply a marketing decision. It was a decision of economic isolationism. It was not a decision based on sound business reasons or to preserve a valuable resource. It was a political decision. To compare the ability and right of state to be treated the same as a "private entrepreneur" is to ignore the practical realities of economic life. The functions of a state, exercisable through its police powers, are much different from the operations of private industry, even if the function of the state is "proprietary" in nature.

The restrictions on sales of cement imposed by the respondents had nothing to do with the health and safety

of the citizens of South Dakota, and did nothing to shelter the citizens of South Dakota from fraud. See *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The preference of sales to South Dakota residents was directed primarily to preserve the economic interests of South Dakota businesses which were experiencing a shortage of cement. The result to petitioner was immediate and direct. Its principal supply of cement was cut off.

The court below continued its heavy reliance on *Hughes v. Alexandria Scrap Corporation*, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976).[3] The United States Court of Appeals, Eighth Circuit states in its judgment of August 7, 1979:

> "South Dakota has not sought to *regulate* interstate commerce in the sale of cement. We conclude that its action is more similar to Maryland's preference for its residents in its entry into the automobile scrap processing market, upheld in *Hughes v. Alexandria Scrap Corp.*, than conduct at which the prohibitions of the Commerce Clause have historically been directed.

3 The United States Court of Appeals, Eighth Circuit, was not without its doubts in ruling in favor of the State of South Dakota. In Footnote 3 of *Reeves v. Kelley* (1979), *supra*, Lay, J. wrote:

> "We are confronted with no other decision where the state, acting in a proprietary capacity, is challenged in its marketing decisions under the Commerce Clause alone. We fully recognize that dictum in earlier decisions provides pause for reflection on whether the distinction we make is a proper one. (Citations omitted.)";

and,

> "If our distinction is incorrect, we think it better for the Supreme Court to make the pronouncement rather than this Court to furrow new ground." *Reeves v. Kelley*, 603 F. 2d at 738 (Footnote 3).

> "We therefore abide by our previous holding that the Commerce Clause does not prohibit South Dakota 'from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 810." *Reeves v. Kelley*, 603 F. 2d at 738-739.

This conclusionary analysis ignores traditional methods of judicial scrutiny entailing "a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce." *Di Santo v. Pennsylvania*, 273 U. S. 34, 44, 47 S. Ct. 267, 271, 71 L. Ed. 524 (1927) (Stone, J., dissenting). By classifying South Dakota's actions with Maryland's actions in *Hughes v. Alexandria Scrap Corp., supra*, the Court below suspends employment of concepts of national commerce distilled into well established constitutional principles by previous decisions. The categorization of state action which plainly burdens interstate commerce as not "the kind of action with which the Commerce Clause is concerned"[4] can lead to dangerous results.

This Court long ago recognized that a state could not hoard its natural resources for the sole use of its citizens where private industry has previously submitted the resources to the channels of interstate commerce. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1922); *Foster-Fountain Packing Company v. Haydel, supra; Johnson v. Haydel*, 278 U. S. 16, 49 S. Ct. 6, 73 L. Ed. 155 (1928);

4 *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 805, 96 S. Ct. at 2495.

and *Toomer v. Witsell, supra.* The South Dakota cement plant has a long history of transactions with out-of-state consumers and of promoting the sale of its product not only intrastate but interstate. It is submitted that the actions of the respondents are identical to those taken by states which have sought to impose embargoes upon natural resources which were produced and marketed within the state by private industry with the exception that the "resources" in this case are state-owned commodities sold by the state.

Hughes v. Oklahoma, supra, emphasizes that the *West* reasoning has emerged as the dominant approach to Commerce Clause challenges to state regulation of exports of natural resources. "And why may not the products of the field be brought within the principle." *West v. Kansas Natural Gas Co.,* 31 S. Ct. at 571. No distinction is advanced in the above-cited cases which indicate that a different result should be obtained whether the articles of commerce are natural resources or other important or valuable resources. Any state action which limits the movement of any resource to the confines of the state, whether state owned or whether owned by private industry, is prohibited when it burdens interstate commerce by preventing the out-of-state consumer from entering that state and being treated the same as the in-state consumer. How can the state be prohibited from regulating private enterprise in the course of interstate commerce and yet be allowed to directly discriminate and burden interstate commerce through its own products? Such economic isolationism condemned by previous cases as abhorrent to the Commerce Clause is impermissible under the Commerce Clause of the Constitution of the United

States despite the fact it is imposed by a state on its own products.

The action of the respondents is one of those clear examples referred to by the Court in *City of Philadelphia v. New Jersey,* 437 U. S. 617, 98 S. Ct. 2531, 47 L. Ed. 2d 475 (1978), in which a state undeniably stops the flow of commerce at the limits of its borders. Even if the restrictions imposed by the Cement Commission were found to be an indirect or incidental burden on interstate commerce and thus subject to the rule enunciated in *Pike v. Bruce Church, Inc., supra,* there is no valid justification for the imposition of the burden which would be overcome by its benefit to local interests. It has traditionally been recognized that such burdens upon interstate commerce, when such burdens are incidental, are legitimate only when the state seeks to protect its citizens by insuring their health or safety and by shielding them from fraud. See *H. P. Hood & Sons v. Du Mond,* 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949). *Pike v. Bruce Church, Inc., supra,* pointed out that the motives of the state must be directed towards the safety of its citizens. 397 U. S. at 143.

The United States Court of Appeals, Eighth Circuit, erred in assuming that private industry in a similar situation could refuse to sell to non-residents if it so chose. This right is not absolute. Private industry engaged in selling commodities in interstate commerce may select its own customers in a bona fide transaction only so long as it does not restrain trade, i. e., eliminate competitors. See Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. § 1 (originally enacted as Act of July 2, 1890, c. 647, 26 Stat. 209). State action designed to protect its citizens from outside competition would be prohibited by the Commerce

Clause. See *Hughes v. Oklahoma, supra.* What the South Dakota Cement Commission has done is to eliminate competition for the purchase of South Dakota cement by consumers in Wyoming, North Dakota, Minnesota, Nebraska, Iowa, Montana and Colorado.

By the standards set up in *Hughes v. Oklahoma, supra,* a decision by the State of South Dakota never to make cement available to out-of-state customers when the commodity could become an article of interstate commerce, is impermissible under the Commerce Clause. This principle does not force any individual, state or political subdivision to market its product in any other state. What it does allow is out-of-state residents to enter every marketplace in the United States and be treated the same as a citizen of the marketing state. This principle is not new. It was recognized and stated in *H. P. Hood & Sons v. Du Mond, supra,* that ". . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." 336 U. S., at 539. It is not a question of forcing South Dakota to enter markets it has not previously entered. It is a question of allowing out-of-state consumers to go to South Dakota, without restriction or preference for South Dakota customers, and deal in a free federal trade unit created and protected by the United States Constitution. Such action is vastly different than a state entering the market as purchaser under a subsidy program as in *Hughes v. Alexandria Scrap Corp., supra,* and favoring its residents.

The holding of the Court below permits the state of South Dakota to elude the purpose of the Commerce Clause by deciding an important constitutional question

not directly addressed in previous decisions of this Court. The results could be disastrous. The federal free trade unit protected by our constitution would become subordinate to the entry of states into commercial enterprises. To allow such an exception would erode the integrity of the Commerce Clause of the Constitution of the United States. This Court should now deal with the important constitutional question of whether respondents may restrict interstate commerce by discriminating against sales of state-owned and state-produced cement to non-residents of South Dakota and preferring sales and deliveries to those who live within the borders of South Dakota.

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CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court
for the District of South Dakota

Submitted: June 14, 1979
Filed: August 7, 1979

Before LAY, ROSS and McMILLIAN, Circuit Judges.
LAY, Circuit Judge.

The Supreme Court has remanded our decision, 586 F. 2d 1230 (8th Cir. 1978), for us to reconsider in light of

its recent opinion in *Hughes v. Oklahoma,* 99 S. Ct. 1727 (1979). Upon review, we discern significant differences between the cases which cause us to adhere to our earlier holding that the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution, is not violated by the State of South Dakota's policy of preferential sale of cement it manufactures to South Dakota residents.

In *Hughes v. Oklahoma* the Supreme Court overruled *Geer v. Connecticut,* 161 U. S. 519 (1896). The Court rejected the legal fiction that a state owns wild game as a representative of its citizens and the correlative theory that it could control not only the taking of game, but also its transportation out-of-state even after it was lawfully possessed by another, thereby preventing it from becoming an item of interstate commerce. 99 S. Ct. at 1731-33. Thus, the well established doctrine that a state may not discriminatorily regulate interstate commerce by giving its residents preferred access over out-of-state residents to local natural resources, *see, e. g., City of Philadelphia v. New Jersey,* 437 U. S. 617 (1978); *Pennsylvania v. West Virginia,* 262 U. S. 553 (1923); *West v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911), now applies as well to wild game.

Our original decision in *Reeves v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978), which upheld South Dakota's preference for in-state residents in its sale of cement, was not based on the rationale that the cement was a state controlled natural resource and therefore South Dakota could regulate or prohibit its trade in interstate commerce. *Reeves v. Kelley* presented the unusual situation in which the challenge was to a state, which as a manufacturer-seller faced with production demands it could not meet,

made an administrative decision to give priority to meeting the needs of its residents. As our opinion pointed out, there was no allegation that South Dakota regulated or restricted out-of-state sale of privately manufactured cement or exercised its police powers to suppress competition in the manufacture or sale of cement. We held that South Dakota was acting in a proprietary capacity in the sale of a product it manufactured and that as such it had the right, as any other entrepreneur, to sell to whomever it chose.[1] The issue remains whether the decision in *Hughes v. Oklahoma* affects our prior holding.

In both *Hughes v. Oklahoma* and *Geer v. Connecticut,* the state restricted out-of-state sale of wildlife reduced to possession and ownership by private individuals. In contrast South Dakota has not attempted "to prevent privately owned articles of trade from being shipped and sold in interstate commerce. . . ." *City of Philadelphia v. New Jersey,* 437 U. S. 617, 627 (1978), (quoting *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 10 (1928)). In entering the market and preferring residents in sales, South Dakota has not attempted to regulate commerce; it has not attempted to interfere with or usurp federal regu-

---

1 A state may freely purchase to meet its needs. Although not in the context of a Commerce Clause challenge, the Supreme Court has written:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

Perkins v. Lukens Steel, Co., 310 U. S. 113, 127 (1940). *See also American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.,* 409 U. S. 904 (1972).

latory power.[2] While out-of-state purchasers such as Reeves may feel the effect of a reduced supply of cement in the interstate market, the effect is the result of a major supplier's temporary marketing decision, not unlike the market force exerted by Maryland's purchasing policies in *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794 (1976).

South Dakota has not sought to *regulate* interstate commerce in the sale of cement. We conclude that its action is more similar to Maryland's preference for its residents in its entry into the automobile scrap processing market, upheld in *Hughes v. Alexandria Scrap Corp.*, than conduct at which the prohibitions of the Commerce Clause have historically been directed.[3]

---

2 The issue posed here is the constitutional restriction under the Commerce Clause on state action when Congress has been silent. A state engaging in business is subject to federal power to regulate commerce regardless of whether it acts in a proprietary or sovereign capacity, see *United States v. California*, 297 U. S. 175, 183-87 (1936), and may even be prohibited from selective marketing practices. *See Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 810 n. 19 (1976); *cf. Douglas v. Seacoast Products, Inc.*, 431 U. S. 265 (1977) (federal preemption of state fishing regulations). We hesitate to hold the Commerce Clause standing alone requires judicial scrutiny of a state's administrative marketing decisions to insure the least discriminatory alternative is chosen. *See* 80 Harv. L. Rev. 1357 (1967).

3 We recognize that Justices Brennan, White and Marshall are of the opinion that the type of state action does not influence application of Commerce Clause restrictions, *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 818 (Brennan, J., dissenting). We also recognize that *Hughes v. Alexandria Scrap Corp.* differs from *Reeves v. Kelley* in Maryland's use of market subsidies and its laudatory environmental goal. Nonetheless, *Hughes v. Alexandria Scrap Corp.* is the decision most analogous factually to the instant case, in which the state participates in the market place as a seller, and we therefore deem its analysis controlling. We are confronted

(Continued on the next page)

(Continued from previous page)

with no other decision where the state, acting in a proprietary capacity, is challenged in its marketing decisions under the Commerce Clause alone. We fully recognize that dictum in earlier decisions provides pause for reflection on whether the distinction we make is a proper one. *See Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 522 (1935) (" '[A] state may not in any form or under any guise, directly burden the prosecution of interstate business.' ") (quoting *International Textbook Co. v. Pigg*, 217 U. S. 91, 112 (1910)); *West v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911). In *West* the Court struck down a protectionist statute saying:

> The statute of Oklahoma recognizes [gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. . . . If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any States. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court.

Id. at 255-56.

Yet these and other relevant decisions involve, in one form or another, state regulation of commercial transactions, and are not apposite to the situation in which an administrative agency of a state, whose initial entry into the manufacture of cement was not made with a discriminatory motive, makes a self-serving marketing decision. If our distinction is incorrect, we think it better for the Supreme Court to make the pronouncement rather than for this court to furrow new ground.

We therefore abide by our previous holding that the Commerce Clause does not prohibit South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 810.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

IN THE SUPREME COURT OF THE
UNITED STATES

No. 78-1194

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, et al.,

Respondents.

ORDER

The petition for a writ of Certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Hughes v. Oklahoma*, 441 U. S. — (1979).

May 14, 1979.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Nos. 78-1578, 78-1720 and 78-1721

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1720

Mullinax Concrete Company, a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1721

Russell's Ready Mix, Inc., a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court
for the District of South Dakota.

Submitted: October 19, 1978

Filed: November 7, 1978

Before LAY, ROSS and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

In 1919 the State of South Dakota, as authorized by its constitution, created a cement commission by legislative charter to carry out the manufacture, distribution and sale of cement as "works of public necessity and importance." S. D. Const. art. XIII, § 10; S. D. Compiled Laws Ann. § 5-17-1,-2,-9. *See generally Eakin v. South Dakota State Cement Comm'n,* 44 S. D. 268, 183 N. W. 651 (1921). In the past the Commission has operated a cement plant and has sold its products to out of state customers as well as to South Dakota residents. In recent months the demand for cement has risen sharply. Therefore, on June 1, 1978, the Commission reaffirmed a policy of supplying all South Dakota customers first and honoring all contract commitments, with the remaining volume being allocated on a first come, first served basis. As a result of this policy and the continuing cement shortage, the Commission refused to sell to out of state customers. Reeves, Inc., a Wyoming corporation, challenged this policy in federal district court. The district court, the Honorable Andrew Bogue presiding, found that such policy violated the Commerce Clause of the United States Constitution, U. S. Const. art. I, § 8, cl. 3, and enjoined its application to Reeves, Inc. Subsequently, Mullinax Concrete Service Co., a Wyoming corporation, and Russell's Ready Mix, Inc., an Iowa corporation, brought suit seeking a permanent injunction of the policy.[1] The court granted the requested relief in each case and permanently enjoined the Commission from taking any action to prohibit the sale of cement to prospective out of state purchasers because of their nonresidency. The State Cement Commission has filed this appeal. We reverse and remand to the district court with directions to vacate the injunctions.

The federal district court in issuing injunctive relief held:

> The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege [sic] and Immunities Clause of the United States Constitution.

Reeves, Inc. v. Kelley, No. 78-5060, slip op. at 3 (D. S. D. July 21, 1978).

Judge Bogue concluded:

---

1 These suits were necessary since following the court's action in *Reeves, Inc. v. Kelley,* No. 78-5060 (D. S. D. July 21, 1978), the Commission adopted a "prioritization" policy, whereby all customers, resident or nonresident, were allowed to purchase an amount equal to 50 per cent of the average amount they had purchased over the last three years. Implementation of that policy or of any other policy requiring out of state sales before the needs of South Dakota customers were met, except as to Reeves, Inc., however, was enjoined by a South Dakota circuit court as violative of the South Dakota Constitution and laws. The Commission obeyed, thus giving rise to *Russell's Ready Mix, Inc. v. Kelley,* No. 78-5073 (D. S. D. Sept. 22, 1978), and *Mullinax Concrete Service Co. v. Kelley,* No. 78-5074 (D. S. D. Sept. 22, 1978). Those cases were consolidated with *Reeves, Inc.* for argument and decision on appeal.

> A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.
>
> This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege [sic] and Immunities Clause.

Id. at 1-2.

The commerce clause[2] has been interpreted as primarily intended to inhibit the power of the states to interfere with the natural functioning of the interstate market through burdensome regulation or prohibition. *See City of Philadelphia v. New Jersey*, 98 S. Ct. 2531, 2535-37 (1978);[3] *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794,

2 We discuss application of the commerce clause only. The plaintiffs are all corporations, and corporations are not citizens within the meaning of the privileges and immunities clause, U. S. Const. art. IV, § 2, cl. 1. *Asbury Hosp. v. Cass County*, 326 U. S. 207, 210-11 (1945); *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 177 (1868).

3 In *City of Philadelphia v. New Jersey*, a decision relied upon by the plaintiffs, the Court struck down a New Jersey statute which prohibited importation of solid or liquid waste collected outside of New Jersey. The case stands for the principle that a state may not prevent shipment of privately owned articles of trade in interstate commerce on the ground of local need or command. *See also Pennsylvania v. West Virginia*, 262 U. S. 553 (1923); *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229 (1911). The Court specifically observed in *City of Philadelphia*, however:

> We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources. . . .

98 S. Ct. at 2537 n. 6.

806 (1976). In the instant case South Dakota has not attempted to pass any regulation or prohibition on any private industry functioning in commerce. It has simply acted in a proprietary capacity as a seller of cement within the interstate cement market. Such activity is not the type of state action the commerce clause was intended to restrict.

In *Hughes v. Alexandria Scrap Corp.*, the State of Maryland in an attempt to rid the landscape of junk cars paid a "bounty" to scrap processors for the destruction of inoperable automobiles over eight years old. An out of state processor was required to show title documentation in order to receive the bounty, whereas an in state processor was not. The result was a reduction in the bounties secured by out of state processors from the State of Maryland. A three judge district court concluded that the act constituted an impermissible burden on interstate commerce. The Supreme Court reversed, holding that the State of Maryland did not prohibit or regulate commerce but merely entered the market as a purchaser. In so holding the court said:

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

426 U. S. at 810.[4]

4 The fact that Maryland was a purchaser and South Dakota a seller is not a significant difference between *Hughes* and this case, since regulation of interstate products going either into or out of a state may offend the commerce clause. *Hughes v. Alexandria Scrap Corp., supra*, 426 U. S. at 808 n. 17.

The State of South Dakota, in carrying out this proprietary activity possesses the rights of and is subject to the regulatory restrictions on any private business making marketing decisions. *See National League of Cities v. Usery,* 426 U.S. 833, 854 n. 18 (1976); *United States v. California,* 297 U.S. 175 (1936). If a private industry had chosen to market the cement, it would be difficult to argue that the United States Constitution would compel it to sell to nonresidents if it did not so choose. We fail to see that the State of South Dakota must be treated any differently, simply because it is a public body rather than a private industry. The mere fact that it at one time sold cement to out of state entities does not place greater restrictions on its business dealings. South Dakota could have chosen never to make its cement available to out of state customers, and the constitutional question, had it arisen, would not be analytically different from that presented by its recent decision to prefer its residents. *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 809, 817 (Stevens, J., concurring). Nothing in this range of possible marketing decisions affects the initial question whether the commerce clause limits South Dakota's power to choose whether, to whom, and on what conditions to sell its goods. We hold that the commerce clause does not.

While a state is similar to private business when it participates in the market in a purely proprietary capacity, it is also somewhat different. As a government providing a public service and utilizing the money and resources of its residents, it has a right and perhaps even an obligation to consider their common good and conserve their resources so long as it does not do so by attempting to regulate or control commerce among the

states. *Toomer v. Witsell,* 334 U.S. 385, 409 (1948) (Frankfurter, J., concurring). The factual background in these cases does not indicate that South Dakota has attempted to control channels of interstate commerce. Accordingly, we hold the commerce clause does not prohibit the State of South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 810. *Cf. American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.,* 409 U.S. 904 (1972) (upholding the validity of state printing statutes which required all public printing of the state to be done in the state).

The causes are remanded with directions to the district court to vacate the injunctive relief issued and to dismiss the respective complaints in each case for failure to state a claim for relief.

It is so ordered.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX "D"

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV78-5060

REEVES, INC.,

Plaintiff,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Defendants.

RESTRAINING ORDER

(Filed July 21, 1978)

Plaintiff made application to this Court for a Temporary Restraining Order, Preliminary Injunction, and a Permanent Injunction, directing the State Cement Plant to abandon its present policy of selling cement only to residents of the State of South Dakota. The Court having heard the arguments presented by counsel at a hearing held July 19, 1978, and after reviewing the memorandums and cases submitted, as well as the law with respect to injunctive relief; the Court finds:

(1) There is a threat of irreparable harm to the Plaintiff if an injunction is not granted;

(2) The balance of said harm to the Plaintiff outweighs any harm to the Defendants; and

(3) The public interest of the entire region (South Dakota, Nebraska, Wyoming, North Dakota, Minnesota, Iowa) will be best served by issuance of this Restraining Order.

Both the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution were intended to protect commercial and personal intercourse from invidious restraints, to prevent interference through conflicting hostile state laws or policies. In the matter of interstate commerce we are a single nation—one and the same people. All the states are bound by these clauses and protected by them. A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.

This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege and Immunities Clause.

The Court is aware of the interest and desires of the Defendants to satisfy both the residents of South Dakota and the out-of-state residents. It realizes that the Defendants are cognizant of the fact that non-residents have, in the past, been loyal users of South Dakota cement, to the financial benefit of South Dakota. The South Dakota

ment Plant, however, cannot refuse to sell cement to Reeves Construction Company simply because it is not an entity within the boundaries of South Dakota. If a state, in this union, were allowed to hoard its commodities or resources for the use of their own residents only, a drastic situation might evolve. For example, Pennsylvania or Wyoming might keep their coal, the northwest its timber, and the mining states their minerals. The result being that embargo may be retaliated by embargo and commerce would be halted at state lines.

Because of the fact that the Defendants in this case were given considerable notice of the hearing on the legal issues contained herein and did appear in opposition to the Plaintiff's applications for Temporary Restraining Order, Preliminary and Permanent Injunctions, and because of the further fact that both sides have thoroughly briefed and argued the legal issues involved herein on the merits, and there being no substantial issue of a material fact, it is the ORDER of this Court that under 65a (2) of the Federal Rules of Civil Procedure, the hearing referred to will be a consolidated final hearing with preliminary injunction hearing, upon all legal issues contained in this case. This injunction will be considered as dispositive of all legal issues raised in this case.

The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution. It is therefore

ORDERED that the South Dakota Cement Commission is restrained from using such policy as related to the Plaintiff herein.

Dated this 21st day of July, 1978.

By the Court:

Andrew W. Bogue
United States District Judge

Attest:

William J. Srstka, Clerk
By Betty B. Berry, Deputy

APPENDIX "E"

MINUTES
SOUTH DAKOTA CEMENT PLANT
JUNE 1, 1978

A regular meeting of the members of the South Dakita Cement Commission was held at Pierre, South Dakota, June 1, 1978 with the following Commission members being present: Tom Kelley, Chairman; Stan Frank, Vice Chairman; John E. Phelps, Secretary-treasurer, Al Sandvig and Dave Johnson.

Also present were William P. Scanlon, President and General Manager; Joseph J. Ziegler, Vice President of Administration, and Mr. Fred Winkler for Plant Counsel, Donald R. Schultz.

The minutes of the resgular meeting of May 18, 1978 were read and approved as written. The Commissioners' per diem allowance for the month of May were reviewed for payment.

The disbursement record and the status of funds invested by the State Investment Officer for the month of May were reviewed and upon motion duly made, seconded and unanimously carried, the Commission approved the same as presented.

The amount of funds necessary to transact business at the Plant for the next thirty-one day (31) period was reviewed and upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

Pursuant to the provisions of Chapter 5-17 of SDCL (1967) IT IS HEREBY RESOLVED: By the South Dakota Cement Commission that its Secretary-treasurer be, and he is authorized and instructed to make a requisition and file the same with the State Auditor for a sum not to exceed Two Million and no/100 Dollars ($2,000,000.00) which is the estimated amount necessary for the transaction of business for the thirty-one day period beginning July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 2 of 3

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

WHEREAS, The provisions of South Dakota Compiled Laws (SDCL) 5-17-2 requires the Commission to annually choose from its membership a chairman,

vice-chairman and secretary-treasurer; therefore

BE IT RESOLVED That the South Dakota Cement Commission has unanimously nominated and elected Mr. Tom Kelley as chairman, Mr. Stan Frank as vice-chairman and Mr. John E. Phelps as secretary-treasurer; and

BE IT FURTHER RESOLVED That said appointments be effective for the ensuing fiscal year commencing July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 3 of 3

Attorney Fred Winkler reviewed with the Commission the notice of hearing to pass, amend and repeal the Plant's retirement rules pursuant to the provisions of SDCL 1-21 and SDCL 5-17-5. Because of the statutory timetables to be adhered to and the requirements of the fiscal note, the Commission authorized management to publish the notice of hearing as soon as practical in accordance with the statutory provisions.

President Scanlon reported to the Commission on the matter of the serious cement shortage being experienced at the plant and throughout the country. This shortage is due to a dramatic increase in cement usage in the regular marketing area, the shortage of supply by all neighboring cement manufacturers and nationally, and the plant's inability to place number six kiln on line as originally planned. Mr. Scanlon also stated that various attempts have been made to procure cement from other cement plants without success. The Commission discussed the Plant's major contract commitments requiring approxi-

mately 218,000 tons of cement for 1978 for paving projects only. After discussing all these matters at considerable length, the Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis. The Commission also instructed management to continue its efforts in procuring additional cement to aid in meeting current demands. Because of the serious cement shortage, President Scanlon was requested to stay in close communication with the Commission on all matters of significant nature.

Chairman Kelley reported to the Commission that the Chicago North Western Railroad line between Rapid City and Pierre is currently slated for extensive repair and replacement.

President Scanlon reported to the Commission on the following items: Plant equipment acquisitions and the status of Plant fuel and power contracts.

The Commission then discussed the annual plant picnic and tentatively set the date for July 16, 1978 with an alternative date of July 23 in the event of inclement weather.

There being no further business to conduct, upon motion duly made, seconded and unanimously carried, the meeting was adjourned until the next regular meeting tentatively scheduled to be held in Rapid City, South Dakota on July 11, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

APPENDIX "F"

Commission Meeting, June 26, 1974 Page 5

The Commission expressed its desire that South Dakota customers and South Dakota contracts be given preference in compliance with the constitution and statutes of this State and that the customers of the Plant be assured that the Plant will make all efforts to fulfill its commitments. President Scanlon announced that the Plant was operating at 98.4% of capacity.

On motion duly made and seconded and carried unanimously, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA CEMENT COMMISSION

There being no further business to come before the meeting, upon motion duly made, the meeting was adjourned with the Commission's expression to the Honorable Richard F. Kneip, Governor of the State of South Dakota for his attendance and advice.

/s/ Tom Kelley, Chairman

/s/ Donald R. Schultz,
Secretary-Treasurer

APPENDIX "G"

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

The Constitution of the United States of America, Article I, Section 8, Clause 3 provides:

> "Section 8. The Congress shall have the Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

28 U. S. C., § 1254 (1), provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U. S. C., § 1331, provides:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff, and, in addition, may impose costs on the plaintiff."

28 U. S. C., § 1443, states:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

28 U. S. C., § 1651 (a), states:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the useages and principles of law."

Federal Rules of Civil Procedure, Rule 65, states:

> "*Rule 65. Injunctions.*
>
> (a) PRELIMINARY INJUNCTION.
>
> (1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.
>
> (2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be inadmissible upon the trial on the merits becomes a part of the record on the trial and need

not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied to save the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may

prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) EMPLOYER AND EMPLOYEE; INTERPLEADER; CONSTITUTIONAL CASES. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, USC, § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, USC, § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

APPENDIX "H"

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE STATE OF SOUTH DAKOTA

The South Dakota Constitution, Article XIII, Section 10, states:

> "The manufacture, distribution and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase or appropriation, all lands, easements, rights of way, tracts, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material, incident or necessary to carry the provisions of this section into effect: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made, except upon a vote of two-thirds of the members elected of each branch of the Legislature."

South Dakota Compiled Laws 5-17-1 states:

> "The people having adopted amendments to our state Constitution to the effect that the manufacture, distribution, and sale of cement and cement products are works of public necessity and importance in which the state may engage, it is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such governmental functions subject to regulation by the state."

South Dakota Compiled Laws 5-17-2 states:

> "There is hereby created a state cement commission. The commission shall consist of five (5) members to be appointed by the Governor for terms of five (5) years. No more than four (4) members may be

> members of the same political party. Any member appointed to fill a vacancy arising from other than the natural expiration of the term shall serve only for the unexpired term. The commission shall annually choose from its membership a chairman, vice-chairman, and secretary-treasurer. No member may be removed from office except for cause."

South Dakota Compiled Laws 5-17-2.1 states:

> "The state cement commission and the state cement plant under its control shall comprise a principal department of state government."

South Daokta Compiled Laws 5-17-9 states:

> "The state cement commission is hereby empowered and authorized to operate the South Dakota state cement plant located at Rapid City, South Dakota, to sell the products produced at said plant, to fix the price of such products and to determine the manner and methods of the terms under which such products shall be sold, to advertise such products to the public in such manner as the commission shall deem proper, and to do all things in the operation of such plant and the sale of its product as the commission may deem necessary or expedient to the successful operation of said plant."

Supreme Court, U. S.
FILED
FEB 26 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In The
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-677

REEVES, INC.,

Petitioner,

vs.

WILLIAM STAKE, RICHARD SAYRE, THOMAS ZELLER, AL SANDVIG, EDWIN GAISER, JOSEPH SIMMONS, and ROGER PRUNTY, Members of the South Dakota Cement Plant Commission,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 25, 1979

CERTIORARI GRANTED JANUARY 14, 1980

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

APPENDIX

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Minutes of the Meeting of the South Dakota Cement Commission dated June 1, 1978 and filed on July 19, 1978, as attachment to petitioner's Complaint. 11

Affidavit of David Harrald filed on July 19, 1978, in support of Motion for Temporary Restraining Order and Preliminary Injunction. 15

Affidavit of C. A. Reeves filed on July 19, 1978, in support of Motion for Temporary Restraining Order and Preliminary Injunction. 22

Page 5 of the Minutes of the Meeting of the South Dakota Cement Commission dated June 26, 1974 and filed July 19, 1978 as Exhibit No. 1. 24

Exhibit No. 3, filed July 19, 1978, showing the shipments of cement from the South Dakota Cement Plant in Rapid City, South Dakota, to various states during the years 1970 through 1977. 26

Restraining Order of the United States District Court for the District of South Dakota, Western Division, dated July 21, 1978, restraining the respondents from implementing its preference policy against petitioner. 27

Affidavit of John E. Phelps, filed on August 1, 1978, in support of a Stay pending appeal. 30

Opinion of the United States Court of Appeals for the Eighth Circuit, dated November 7, 1978, 586 F. 2d 1230 (8th Cir., 1978). 35

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIVIL ACTION NO. 78-5060

Date	NR.	Proceedings
July 19, 1978	2	Complaint Filed.
July 19, 1978	3	Motion for Temporary Restraining Order and Preliminary Injunction filed.
July 19, 1978	4	Affidavit in Support of Motion Filed—David Harrald.
July 19, 1978	5	Affidavit of C. A. Reeves filed.
July 19, 1978		Hearing on Temporary Restraining Order before the Honorable Andrew W. Bogue, Judge Presiding—Ruling Reserved.
July 21, 1978	10	Order granting Temporary Restraining Order and Preliminary Injunction filed.
August 1, 1978	12	Notice of Appeal filed.
August 1, 1978	15	Application for Stay Pending Appeal filed.
August 1, 1978	16	Affidavit in Support of Stay Pending Appeal filed.
August 2, 1978	17	Order denying Application for Stay Pending Appeal filed.
August 17, 1978	19	Motion and Answer filed.

August 23, 1978	21	Appeal from the United States District Court from the District of South Dakota filed.
November 16, 1978	22	Order that Injunction is vacated and Complaint is dismissed filed.
December 5, 1978	23	Mandate from the Eighth Circuit Court of Appeals remanding this action to District Court filed.
December 5, 1978	24	Opinion of the Eighth Circuit Court of Appeals filed.
June 18, 1979	27	Order of the Eighth Circuit Court of Appeals for this Court to return Mandate filed.
June 18, 1979	28	Order of the Supreme Court of the U. S. that judgment of the U. S. Court of Appeals is vacated with costs and cause is remanded to same filed.
June 19, 1979	29	Order of U. S. District Court vacating dismissal order of November 16, 1978 and reinstating injunctive order of July 21, 1978.
September 6, 1979	30	Opinion of the United States Court of Appeals for the Eighth Circuit filed.
September 6, 1979	31	Mandate of the United States Court of Appeals for the Eighth Circuit remanding this action to the United States District Court filed.

RELEVANT PLEADINGS, FINDINGS and OPINIONS

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIVIL ACTION NO. 78-5060

REEVES, INC.,

Plaintiff,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Defendants.

COMPLAINT

COME NOW the plaintiff, and for its Complaint against the defendants, states and alleges as follows:

I.

JURISDICTION

This is a suit for injunctive relief against the members of the South Dakota Cement Commission who have, under color of state law, taken certain action which impedes the flow of interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, which confers upon Congress the power "to regulate Commerce . . . among the several States" and which deprives the plaintiff of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Jurisdiction of this Court is invoked under 28 U. S. C. 1331 and 28 U. S. C. 1443.

II.

PLAINTIFF

(a) Plaintiff is a corporation organized and existing under the laws of the State of Wyoming, with its principal place of business at Buffalo, Wyoming. Plaintiff is engaged in the business of the sale of concrete and concrete products and conducts its business in a three-county area located in Sheridan, Johnson, and Campbell Counties Wyoming. Plaintiff supplies approximately 54% of the consumers who purchase concrete within its market area. Plaintiff receives 100% of its cement, a necessary ingredient in the production of concrete from outside the State of Wyoming.

(b) For the last twenty (20) years, since its inception in 1958, plaintiff has received 95% of its cement from the South Dakota Cement Commission in Rapid City, South Dakota. During the calendar year of 1977, plaintiff purchased approximately $1,172,000 worth of cement from the South Dakota Cement Commission at its plant in Rapid City, South Dakota. During the first six months of 1978, plaintiff received approximately 25% of its cement needs from Ideal Cement Company in Billings, Montana.

(c) Upon delivery to plaintiff's concrete plants in Wyoming, the cement is mixed with other ingredients for concrete. The concrete and concrete products are exclusively produced for sale through permanent outlets in Buffalo, Gillette, and Sheridan, Wyoming. Reeves, Inc. does sell approximately 5% of its concrete or concrete

products outside of the State of Wyoming. Stockpiles of cement held by Reeves, Inc. are exhausted and the production of concrete by plaintiff has been reduced to 25% of estimated production capacity.

(d) Since January 1, 1975, plaintiff has purchased from the South Dakota Cement Plant the following dollar volumes:

1975	$ 871,000
1976	824,000
1977	1,172,000
1978 to June 30, 1978	235,000

(e) Plaintiff has made an investment of about $3,000,000 over the last twenty (20) years in plant equipment, supplies, facilities and material sources, in reliance upon its expectation of having a continuing source of supply of cement from the South Dakota Cement Plant.

III.

DEFENDANTS

(a) Defendants are members of the South Dakota Cement Commission, appointed pursuant to SDCL 5-17-2 to administer and control the South Dakota Cement Plant at Rapid City, South Dakota. Constitutional Authorization for the operation of said plant is conferred by Article XIII, Section 10 of the Constitution of South Dakota. The South Dakota Cement Commission is an "agency" as defined in SDCL 1-26-1 (1).

IV.

(a) The South Dakota Cement Plant is engaged in interstate commerce. Coal and other materials essential to

its operations are procured through the channels of interstate commerce. Cement produced by the plant is sold in interstate commerce.

(b) Plaintiff is engaged in interstate commerce. There are no facilities within Wyoming producing cement, except a plant at Laramie, serving the southern portion of the state. Plaintiff's entire business operation consists of procuring cement through the channels of interstate commerce and furnishing concrete to purchasers in Wyoming. All users of cement products in northern Wyoming are dependent upon the channels of interstate commerce for their needs.

(c) By Regulation 15:01:05:01 1974 ARSD, sales representatives of the cement plant are authorized to travel in the States of North Dakota, Minnesota, Nebraska, Iowa, Wyoming, Montana, and Colorado to solicit customers for the plant, which states are defined as the marketing area for the plant.

(d) Under Regulation 15:01:08:01 1974 ARSD, plaintiff is a "qualified buyer".

V.

On June 1, 1978, the defendants, acting under color of state law, took the following action:

> "The Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments with the remaining volume allocated on a first come, first serve basis."

VI.

The "contract commitments" referred to above, together with demands of South Dakota customers presently

consume the entire production of the South Dakota Cement Plant, thereby cutting off this plaintiff from its accustomed source of supply of cement, crippling its business, and inflicting irreparable damage upon it.

VII.

On July 5, 1978, the plaintiff dispatched a cement truck to the South Dakota Cement Plant in Rapid City, South Dakota, and requested that the truck be loaded with cement, at which time the driver of the plaintiff's truck was informed that the truck could not be loaded for the reason that plaintiff is located and does business outside the State of South Dakota. Under the action of the defendants and under color of state law, plaintiff is denied the opportunity to purchase cement from the South Dakota Cement Plant, whereas a resident of the State of South Dakota conducting the same type of business is allowed to purchase cement.

VIII.

In reliance upon a close business relationship between the plaintiff and the South Dakota Cement Plant in Rapid City, South Dakota developed over the last twenty (20) years, plaintiff has dealt almost exclusively with the South Dakota Cement Commission for its source of cement without the requirement by either party of a written contract. The defendants have encouraged and sanctioned the sale of cement to the plaintiff to the extent that plaintiff has relied almost entirely on its supply of cement from the South Dakota Cement Plant for the operation of its business. As a result, plaintiff is unable, after diligent efforts, to locate

any other feasible source of the supply of cement needed for its continued operation.

IX.

CAUSES OF ACTION

FIRST COUNT

(a) The plaintiff's activities described in paragraph II, by which the plaintiff purchases cement from the defendant at its plant in Rapid City, South Dakota, necessary for its business, constitute interstate commerce. The action of the defendants imposes an undue burden on, and discriminates against, interstate commerce by discriminating between the plaintiff and residents of South Dakota, based solely on residence, all in violation of the Commerce Clause of the United States Constitution.

(b) There is no reasonable basis for the arbitrary and capricious restriction sought to be imposed on plaintiff who regularly maintains a business outside the state of South Dakota.

SECOND COUNT

(a) The "Policy" reaffirmed by the members of the South Dakota Cement Commission on June 1, 1978, described in paragraph IV above, a copy of which is attached hereto, is a rule as defined under SDCL 1-26-1 (7).

(b) Said Policy was adopted and reaffirmed in violation of SDCL 1-26-4 requiring a notice and hearing of the proposed rule-making.

(c) No general notice of proposed rule-making was published in accordance with state law and plaintiff has

been denied the opportunity to participate in the rule-making through submission of written data, views or argument.

(d) The action of the defendants is invalid as to the plaintiff in that the action is arbitrary and capricious on its face and in effect deprives the plaintiff of the privilege of doing business without due process of law.

X.

IRREPARABLE HARM

(a) In view of the action of defendants and in view of the fact that there is a shortage of a supply of cement and no other sources for supply are presently available, plaintiff will be prohibited from doing business and will thereby suffer irreparable loss and damage in excess of the sum of $10,000, exclusive of interest and cost.

(b) Plaintiff has no adequate remedy in law and for that reason it is impossible to estimate with any degree of accuracy the amount of damage that will be incurred by the plaintiff by reason of the threatened deprivation of its business for the reasons given above.

(c) Plaintiff's continued existence depends on the revenue received by it for the sale of concrete. In the event cement is unavailable from South Dakota Cement Commission, plaintiff will suffer great irreparable damage due to the loss of its sale of concrete. The result in loss of revenue caused by the loss of concrete will materially and drastically affect its ability to continue to serve the public.

WHEREFORE, plaintiff prays:

1. That this Court will make an Order restraining and enjoining defendant from enforcing the terms of the directive of June 1, 1978, against agents, representatives, and employees of plaintiff until final hearing and termination of this cause or until further Order of this Court.

2. That after hearing thereon the Court adjudge the directive to be unconstitutional and therefore unenforceable.

3. That this Court make permanent the restraining order and injunction against enforcement of the directive of June 1, 1978.

4. That defendants be directed to allocate to this plaintiff a pro-rata portion of current production based on plaintiff's purchases during the year of 1977.

5. For such other and further relief as the Court may deem proper.

DATED this 19 day of July, 1978.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

By: /s/ Geo. A. Bangs
Attorneys for Plaintiff

818 St. Joe Street; P. O. Box 2670
Rapid City, SD 57709

KIRVEN & KIRVEN

By: /s/ Dennis M. Kirven

104 Fort Street
Buffalo, WY 82834

(Verification and jurat omitted in printing.)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ATTACHMENT TO COMPLAINT

MINUTES

SOUTH DAKOTA CEMENT PLANT

JUNE 1, 1978

A regular meeting of the members of the South Dakota Cement Commission was held at Pierre, South Dakota, June 1, 1978 with the following Commission members being present: Tom Kelley, Chairman; Stan Frank, Vice Chairman; John E. Phelps, Secretary-treasurer, Al Sandvig and Dave Johnson.

Also present were William P. Scanlon, President and General Manager; Joseph J. Ziegler, Vice President of Administration, and Mr. Fred Winkler for Plant Counsel, Donald R. Schultz.

The minutes of the regular meeting of May 18, 1978 were read and approved as written. The Commissioners' per diem allowance for the month of May were reviewed for payment.

The disbursement record and the status of funds invested by the State Investment Officer for the month of May were reviewed and upon motion duly made, seconded and unanimously carried, the Commission approved the same as presented.

The amount of funds necessary to transact business at the Plant for the next thirty-one day (31) period was reviewed and upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA
CEMENT COMMISSION

Pursuant to the provisions of Chapter 5-17 of SDCL (1967) IT IS HEREBY RESOLVED: By the South Dakota Cement Commission that its Secretary-treasurer be, and he is authorized and instructed to make a requisition and file the same with the State Auditor for a sum not to exceed Two Million and no/100 Dollars ($2,000,000.00) which is the estimated amount necessary for the transaction of business for the thirty-one day period beginning July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 2 of 3

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA
CEMENT COMMISSION

WHEREAS, The provisions of South Dakota Compiled Laws (SDCL) 5-17-2 requires the Commission to annually choose from its membership a chairman, vice-chairman and secretary-treasurer; therefore

BE IT RESOLVED That the South Dakota Cement Commission has unanimously nominated and elected Mr. Tom Kelley as chairman, Mr. Stan Frank as vice-chairman and Mr. John E. Phelps as secretary-treasurer; and

BE IT FURTHER RESOLVED That said appointments be effective for the ensuing fiscal year commencing July 1, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

Commission Meeting
June 1, 1978
Page 3 of 3

Attorney Fred Winkler reviewed with the Commission the notice of hearing to pass, amend and repeal the Plant's retirement rules pursuant to the provisions of SDCL 1-21 and SDCL 5-17-5. Because of the statutory timetables to be adhered to and the requirements of the fiscal note, the Commission authorized management to publish the notice of hearing as soon as practical in accordance with the statutory provisions.

President Scanlon reported to the Commission on the matter of the serious cement shortage being experienced at the plant and throughout the country. This shortage is due to a dramatic increase in cement usage in the regular marketing area, the shortage of supply by all neighboring cement manufacturers and nationally, and the plant's inability to place number six kiln on line as originally planned. Mr. Scanlon also stated that various attempts have been made to procure cement from other cement plants without success. The Commission discussed the Plant's major contract commitments requiring approximately 218,000 tons of cement for 1978 for paving projects only. After discussing all these matters at considerable length, the Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come, first served basis. The Commission also instructed management to continue its efforts in procuring additional cement to aid in meeting current demands. Because of the serious cement shortage, President Scanlon

was requested to stay in close communication with the Commission on all matters of significant nature.

Chairman Kelley reported to the Commission that the Chicago North Western Railroad line between Rapid City and Pierre is currently slated for extensive repair and replacement.

President Scanlon reported to the Commission on the following items: Plant equipment acquisitions and the status of Plant fuel and power contracts.

The Commission then discussed the annual plant picnic and tentatively set the date for July 16, 1978 with an alternative date of July 23 in the event of inclement weather.

There being no further business to conduct, upon motion duly made, seconded and unanimously carried, the meeting was adjourned until the next regular meeting tentatively scheduled to be held in Rapid City, South Dakota on July 11, 1978.

/s/ Tom Kelley
Chairman

/s/ John E. Phelps
Secretary-treasurer

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

(Caption omitted in printing.)

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

David Harrald being first duly sworn on oath deposes and states as follows:

I am 38 years of age and live in Buffalo, Wyoming. I am presently the vice-president and general manager of Reeves, Inc. and have held that position since September of 1977. I am thoroughly familiar with the books, records and history of the company.

Reeves, Inc. is a Wyoming corporation engaged in the production and marketing of ready-mixed concrete in the Wyoming cities of Buffalo, Gillette, and Sheridan and the surrounding area. The company supplies roughly 54% of the ready-mixed concrete in Sheridan, Johnson and Campbell counties, Wyoming. Almost all of the sales of the company are in the state of Wyoming although there are some sales in Montana.

The company was founded by Al Reeves approximately 20 years ago and has been a customer of the South Dakota Cement Plant ever since that time. Up until the calendar year 1978, Reeves, Inc. obtained 95% of its portland cement from the South Dakota Cement Plant at Rapid City, South Dakota. Portland cement is mixed with sand, gravel and water to produce ready-mixed concrete which is sold to the customers of Reeves, Inc. Reeves, Inc. does not make any other product than concrete products. Its

only other receipts are from some incidental sales of related materials. During the 20 year period, sales representatives of the Rapid City Cement Plant have consistently called upon the company and encouraged the company to rely exclusively upon the South Dakota Cement Plant as a source of supply of portland cement.

In July of 1974, Al Reeves sold the stock of the corporation to Al Johnson Construction Company, a corporation having its headquarters and principal place of business in Minneapolis, Minnesota, and since that time, Reeves, Inc. has been operated as a wholly owned subsidiary of Johnson.

After Affiant's appointment to head up the company's operations, he was called upon by John Williams, a sales representative of the South Dakota Cement Plant in affiant's office in Buffalo, Wyoming. The discussion concerned the needs of Reeves, Inc. for portland cement during the remainder of the year 1977. These needs were estimated, orders were placed and shipped in accordance with the long established custom and course of dealing with said establishment. There was a slight interruption of deliveries because of mechanical difficulties at the plant, but never any suggestion of any curtailment of the availability of portland cement from the South Dakota Plant.

From my familiarity with the books, records and personnel of the company, I know that the company has been regularly visited by sales representatives from the South Dakota Cement Plant; that the company has been encouraged to rely exclusively upon the South Dakota Cement Plant for all of its needs for portland cement; and that the company has built its business, invested its capital and

made its plans in reliance upon the expectation of a continuing supply of portland cement from that source. Reeves, Inc. has a capital investment of approximately three million dollars in plant equipment, supplies, facilities, and material sources.

In planning for the year 1978, I determined that it was more feasible to procure portland cement for the Sheridan operation from Ideal Basic Industries of Three Forks, Montana since that plant is geographically competitive and available. In January of 1978, I toured the Rapid City Plant and was fearful that they might have production problems arising out of their construction. I was also aware of a possible regional shortage west of the Mississippi. This shortage has recently spread to the eastern states also.

Accordingly, our plans for 1978 called for procurement of approximately 25% of our portland cement from Ideal and the remaining 75% from the South Dakota Cement Plant.

On July (sic) 30, 1978 I was informed by telephone by our Gillette manager that the South Dakota Cement Plant was refusing to take orders for shipment of cement after the first of July. On June 30, 1978, I also talked with Mr. Holeton at the South Dakota Cement Plant and that message was confirmed.

During the calendar year of 1977, Reeves, Inc. purchased approximately $1,172,000 worth of cement from the South Dakota Cement Plant in Rapid City, South Dakota. Approximately two-thirds of this cement was transported in trucks owned by the plaintiff and delivered to plaintiff's

concrete plants in Sheridan, Buffalo, and Gillette, Wyoming. Approximately one-third of this cement was transported by the South Dakota Cement Plant to the concrete plants owned by Reeves, Inc. in trucks contracted for delivery by the plant.

On July 5, 1978, I dispatched a cement truck owned by Reeves, Inc. to the South Dakota Cement Plant in Rapid City, South Dakota. The driver of the truck has informed me that he requested that the truck be loaded with cement at which time the driver was informed that the truck could not be loaded for the reason that Reeves, Inc. was a business located outside of the State of South Dakota. Subsequently, I talked by telephone with Mike Holeton, sales representative for the South Dakota Cement Plant in Rapid City, South Dakota, and he stated that there would be no out of state shipments of cement from the plant in Rapid City pursuant to the order of the members of the South Dakota Cement Commission. The driver of the truck has informed me that he was told on July 5, 1978, upon being refused the load of cement, that he could not get a load; not today, not tomorrow, and he was not to come back until he or his company was called.

On June 7, 1978, I had a telephone conversation with John Williams, sales representative of South Dakota Cement Commission. I discussed with him, the needs of Reeves, Inc. for cement from the South Dakota Cement Plant in Rapid City, South Dakota for the third quarter of the calendar year of 1978. Mr. Williams indicated that the South Dakota Cement Plant would supply plaintiff with two to three loads of cement per working day through the third quarter of 1978 for delivery to the plant owned

by Reeves, Inc. at Gillette, Wyoming. On June 14, 1978, I met with Mr. Williams in Buffalo, Wyoming at my office. He stated that although there had been a demand for the cement from the South Dakota Cement Plant in excess of production capacity, he was sure that Reeves, Inc. would receive their estimated needs for cement at the plant located in Gillette, Wyoming. Mr. Williams did not indicate in any manner or fashion that furnishing of the cement supply to Reeves, Inc. would terminate on July 1, 1978. At this time I believed that sufficient supply of cement would be forthcoming from the South Dakota Cement Plant based on their representations made to me by Mr. Williams. It was not until the telephone conversation of June 30, 1978 described above, that I became aware that the South Dakota Cement Plant would not supply the necessary needs for the continued operations of the concrete plants owned by Reeves, Inc. and located in Gillette and Buffalo, Wyoming.

If Reeves, Inc. is cut off by the South Dakota Cement Plant during the next six months, the results will be approximately as follows:

(a) We have already laid off 20 out of 60 persons and we will have to lay off another 15. Our sales operations at Buffalo and Gillette are closed down.

(b) Reeves, Inc. has a fixed cost of doing business at a rate of $22,000 per week. Through the supply of cement from Ideal Basic Industries, Reeves, Inc. is presently able to sell, through its concrete plant in Sheridan, Wyoming, approximately 600 cubic yards of concrete per week. The total estimated production capacity for Reeves, Inc., if its supply of three loads per day from the South Dakota

Cement Plant in Rapid City, South Dakota were available, would be 2,500 cubic yards per week. The curtailment of its supply of cement by the South Dakota Cement Commission has resulted in a 76% reduction in production capacity and a 76% reduction in potential sales. If Reeves, Inc. is able to obtain a continued supply of 25% of its needs from Ideal Basic Industries without its needed supply from the South Dakota Cement Plant in Rapid City, South Dakota, Reeves, Inc. will expend and lose in fixed costs the sum of $492,000 during the period of July 1, 1978 to December 31, 1978. In addition, Reeves, Inc. will suffer loss of customer goodwill and confidence through its inability to fulfill its customer's needs.

(c) Because of the seasonal construction period within the market area of Reeves, Inc., the traditional profits made by Reeves, Inc. are made during the months of June through October of each year. In January of 1978, I estimated that the potential profits for Reeves, Inc. during the calendar year of 1978 would be approximately $250,000. Because of the curtailment of its supply of cement from the South Dakota Cement Plant in Rapid City, South Dakota during and after the months of July of 1978, Reeves, Inc. will lose its opportunity to make a profit of $250,000. At the present time, Reeves, Inc. has outstanding commitments to supply concrete for the following projects within its market area:

a. Johnson County School District No. 1 for the construction of an elementary school building located in Buffalo, Wyoming.

b. Johnson County School District No. 1 for the construction of a school addition to Kaycee High School in Kaycee, Wyoming.

c. The city of Gillette for the construction of Gillette Avenue.

d. The State of Wyoming for the construction of Highway 59, north of Gillette, Wyoming.

e. Various commitments to private customers for the construction of homes, streets, sidewalks, commercial buildings, and residences throughout the market area.

Because of the current regional shortage of cement, I have been unable to locate an alternate source of supply of cement for the continued operations of the concrete plants owned by Reeves, Inc. and located in Buffalo and Gillette, Wyoming. Having relied on the representations made by the sales representatives of the South Dakota Cement Plant and made to me in June of 1978 and the historical exclusive dealings by Reeves, Inc. with the South Dakota Cement Plant for its supply of cement, I have been unable to locate a new source of supply by any cement producer west of the Mississippi River. Reeves, Inc., through its representatives and through the representatives of Al Johnson Construction Company, every major cement producer west of the Mississippi has been contacted for delivery of cement to the plants in Buffalo and Gillette, Wyoming and without success. I have been informed by several of the other major producers that because of the current demand for cement during the height of the construction period, that no additional supplies are available. These representatives have located some supplies of cement in states located east of the Mississippi River, but because of transportation problems, particularly the shortage of box cars and current governmental transportation restrictions,

the cement is not available for delivery to Reeves, Inc. in the State of Wyoming.

/s/ David Harrald

(Jurat omitted in printing.)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

(Caption omitted in printing.)

AFFIDAVIT

C. A. REEVES, being first duly sworn, upon his oath deposes and states as follows:

1. I am 63 years old and I now reside in Casa Grande, Arizona. I am the former owner and former president of Reeves, Inc., a Wyoming corporation. I began the ready-mix concrete business in Buffalo, Wyoming (then known as Reeves Concrete Products) in 1958 and subsequently incorporated the business as a Wyoming corporation in March of 1965. In July, 1974, my wife, Reta C. Reeves, and I sold all of our interest in Reeves, Inc. to Al Johnson Construction Company, who is the present stockholder of Reeves, Inc.

2. Reeves Concrete Products was started in 1958 when I purchased a small local ready-mix operation located in Buffalo, Wyoming. At the time of purchase the then owner of the ready-mix operation was purchasing ce-

ment from the South Dakota Cement plant in Rapid City, South Dakota. I continued to purchase cement for the operations of Reeves Concrete Products from the South Dakota Cement plant in Rapid City. In the Summer of 1959 I opened a concrete ready-mix operation in Gillette, Wyoming. Ever since the commencement of the ready-mix operations located in Buffalo and Gillette, Wyoming, I purchased all cement for these plants from the South Dakota Cement plant in Rapid City, South Dakota until I sold the business in 1974.

3. In 1966, the company expanded its operations to include a plant at Sheridan, Wyoming. Approximately 50% of the cement needs for the plant located in Sheridan, Wyoming, were purchased from the South Dakota Cement plant in Rapid City, South Dakota.

4. Since its inception in 1958 Reeves has been visited regularly and periodically by sales representatives from the South Dakota Cement plant in Rapid City. At these meetings, with either myself or the plant managers in Gillette and Sheridan, Wyoming, the cement needs of the individual plants were discussed with the sales representative. Upon making estimates of the plant needs for cement, the sales representatives of the South Dakota Cement plant, with one exception in 1971 or 1972 (I cannot recall the exact date) assured me or my representatives that all cement needs for the operations of Reeves, Inc. would be met by the South Dakota Cement plant in Rapid City. The sales representatives never requested that Reeves, Inc. enter into written contracts or place written orders for cement at the time of their visits. The customary method of dealing was to call the cement plant at

Rapid City, South Dakota and place the order or send a truck to the plant for loading. These visits by sales representatives from South Dakota Cement plant were not at the request of either myself or the management of Reeves, Inc., but were made on a regular basis by the plant apparently under their sales policy of encouraging the establishment of customer accounts. From the commencement of the operations in Buffalo in 1958 and the plant in Gillette in December, 1959, to the time of my sale of the business in 1974 all of the cement needs for the operations in Buffalo and Gillette were met and filled by the South Dakota Cement plant in Rapid City.

DATED this 17th day of July, 1978.

/s/ C. A. Reeves

(Jurat omitted in printing.)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EXHIBIT NO. 1

Commission Meeting, June 26, 1974 Page 5

The Commission expressed its desire that South Dakota customers and South Dakota contracts be given preference in compliance with the constitution and statutes of this State and that the customers of the Plant be assured that the Plant will make all efforts to fulfill its commitments. President Scanlon announced that the Plant was operating at 98.4% of capacity.

On motion duly made and seconded and carried unanimously, the following resolution was adopted:

RESOLUTION OF THE SOUTH DAKOTA
CEMENT COMMISSION

There being no further business to come before the meeting, upon motion duly made, the meeting was adjourned with the Commission's expression to the Honorable Richard F. Kneip, Governor of the State of South Dakota for his attendance and advice.

/s/ Tom Kelley, Chairman /s/ Donald R. Shultz,

Secretary-Treasurer

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EXHIBIT NO. 3

SHIPMENTS (Short Tons)

	70	71	72	73	74	75	76	77
Iowa	523	1547	5047	7950	15172	8065	9976	18600
Minn.	169	16409	19382	43494	70116	45352	39489	33187
Mont.	5583	6903	8608	11837	9370	7328	8190	12591
NE	14635	20095	28583	70322	44831	20341	19819	24258
ND	43018	51290	64164	75776	61192	67063	73704	86625
SD	205844	274810	278187	309165	326666	292338	359131	298746
Wy.	27992	41826	52346	30067	37130	54711	120239	100922
Colo.	2	154	19938	390	-	-	999	3664
Wis.	4	916	-	-	-	-	-	6
Okla.	-	-	-	42	-	-	-	-
Utah	-	-	-	-	-	-	-	24
	297770	413950	476255	549043	564477	495198	631597	578623

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV78-5060

REEVES, INC.,

Plaintiff,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Defendants.

RESTRAINING ORDER

(Filed July 21, 1978)

Plaintiff made application to this Court for a Temporary Restraining Order, Preliminary Injunction, and a Permanent Injunction, directing the State Cement Plant to abandon its present policy of selling cement only to residents of the State of South Dakota. The Court having heard the arguments presented by counsel at a hearing held July 19, 1978, and after reviewing the memorandums and cases submitted, as well as the law with respect to injunctive relief; the Court finds:

(1) There is a threat of irreparable harm to the Plaintiff if an injunction is not granted;

(2) The balance of said harm to the Plaintiff outweighs any harm to the Defendants; and

(3) The public interest of the entire region (South Dakota, Nebraska, Wyoming, North Dakota, Minnesota,

Iowa) will be best served by issuance of this Restraining Order.

Both the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution were intended to protect commercial and personal intercourse from invidious restraints, to prevent interference through conflicting hostile state laws or policies. In the matter of interstate commerce we are a single nation—one and the same people. All the states are bound by these clauses and protected by them. A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.

This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege and Immunities Clause.

The Court is aware of the interest and desires of the Defendants to satisfy both the residents of South Dakota and the out-of-state residents. It realizes that the Defendants are cognizant of the fact that non-residents have, in the past, been loyal users of South Dakota cement, to the financial benefit of South Dakota. The South Dakota Cement Plant, however, cannot refuse to sell cement to

Reeves Construction Company simply because it is not an entity within the boundaries of South Dakota. If a state in this union, were allowed to hoard its commodities or resources for the use of their own residents only, a drastic situation might evolve. For example, Pennsylvania or Wyoming might keep their coal, the northwest its timber, and the mining states their minerals. The result being that embargo may be retaliated by embargo and commerce would be halted at state lines.

Because of the fact that the Defendants in this case were given considerable notice of the hearing on the legal issues contained herein and did appear in opposition to the Plaintiff's applications for Temporary Restraining Order, Preliminary and Permanent Injunctions, and because of the further fact that both sides have thoroughly briefed and argued the legal issues involved herein on the merits, and there being no substantial issue of a material fact, it is the ORDER of this Court that under 65a (2) of the Federal Rules of Civil Procedure, the hearing referred to will be a consolidated final hearing with preliminary injunction hearing, upon all legal issues contained in this case. This injunction will be considered as dispositive of all legal issues raised in this case.

The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege and Immunities Clause of the United States Constitution. It is therefore

ORDERED that the South Dakota Cement Commission is restrained from using such policy as related to the Plaintiff herein.

Dated this 21st day of July, 1978.

By the Court:
Andrew W. Bogue
United States District Judge

Attest:
William J. Srstka, Clerk

By Betty B. Berry, Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

(Caption omitted in printing.)

AFFIDAVIT IN SUPPORT
OF STAY PENDING APPEAL

Comes now John E. Phelps, Secretary-treasurer of the South Dakota Cement Commission, a department of the State of South Dakota, and a named Defendant in the above-entitled action being first duly sworn on oath, deposes and states that he is authorized to make and does make this Affidavit on behalf of himself and the other Defendants in this action in support of a stay from the order of the Court granting a preliminary and permanent injunction dated July 21, 1978, the facts were obtained by attendance at a public hearing of a special meeting of the Commission at Sioux Falls, South Dakota, on July 24, 1978.

I.

PRELINIMARY STATEMENT

That the Commission, in the adoption of its June 1, 1978, policy (Plaintiff's Exhibit —) of supplying all South Dakota customers first and honoring all contractual commitments and the remaining cement to be allocated on the first-come-first-served basis, was, in good faith, attempting to discharge its duties under the Constitution and statutory mandates of the State of South Dakota, specifically, SDCL 5-17-1, wherein the legislature of the State of South Dakota has declared that the manufacture, distribution and the sale of cement and cement products for public purposes impressed with a public use and as such governmental functions subject to regulation by the State through the Commission as designated in SDCL 5-17-9.

That this Commission policy was a continuation of the policy of the State Cement Commission, commencing as early as 1920 when the Commission, in its report to the Governor, found that

> "That there would be a ready market for the entire output of the State within the State.
>
> That in case there is a surplus, a ready market is available in adjoining states."

This policy was again reviewed and restated by the Commission on June 26, 1974, (Plaintiff's Exhibit).

II.

DEMAND

The demand for cement in the State of South Dakota exceeds the capacity of the plant. The plant shipped during the first six month of 1978, ending June 30, 1978,

267,000 tons. The demand for cement in South Dakota, for the remaining six months in 1978 is in excess of the plant's capacity of 252,000 tons.

III.

AGRICULTURAL SECTOR

That there exists within the State of South Dakota an extreme shortage of grain storage capacity. It is estimated that there is a 5,000% increase in demand for cement from the agricultural sector, primarily caused by a Federal grain storage financing plan enacted in June of 1977.

IV.

PUBLIC SECTOR

It is estimated by the Associated General Contractors that the public use in South Dakota for the last half of 1978, will demand 220,400 tons. It is estimated for the calendar year 1979, there will be a public use demand in South Dakota for approximately 342,000 tons.

V.

STATE TRANSPORTATION DEPARTMENT

Your Affiant has been informed by the State Transportation Department that there are bid lettings, commencing July 1, 1978, for fiscal 1978, requiring 77,678 tons of cement. Additionally, there are deficient county bridges within the State of South Dakota which have become a high priority item. These receive Federal aid funds and are a priority item for the Department of Transportation (see attached letter dated July 25, 1978).

VI.

HEALTH CARE FACILITIES

There are a number of health care projects presently underway in the State of South Dakota, both public and private funding which are considered and authorized by the Department of Health under its certificate of need program to be necessary under the certificate-of-need programs, SDCL 37-A as essential to the health and medical care of the citizens of the State.

VII.

INDIAN RESERVATIONS

That there are presently pending public housing projects within the Indian reservations of the State of South Dakota for public housing programs for the housing and sheltering of the Indian Tribal population, authorized by the U.S. Congress as necessary to the public health and welfare of the Tribal population.

VIII.

CONTRACTUAL COMMITMENTS

That the South Dakota Cement Commission has contractual commitments to contractors within and without the State of approximately 75,000 tons.

IX.

IRREPARABLE INJURY

Your affiant, based upon best available information, is informed and believes and therefore states it to be a fact; that the petitioners in the performance of the Court's order will inflict upon the State of South Dakota and its

citizens an irreparable injury, if they are required to ship cement to nonresidents of South Dakota. The resulting shortage of cement will seriously impair this State's economy, and will result in wide-spread unemployment greatly taxing the State's resources, unemployment compensation fund, and general welfare of the citizens.

X.

PROBABILITY OF SUCCESS ON THE MERITS

Your affiant is informed and believes and represents to the Court that the Commission in good faith intends to prosecute an appeal to the Court of Appeals for the Eighth Circuit relying on the basic premise that the State of South Dakota is the owner of the Cement Plant and can distribute and sell the production of the Cement Plant in such a manner that it deems to be in the best interest of the State to promote the public welfare, prosperity and contentment of its citizens. *Eakin v. South Dakota Cement Commission,* SD, 183 N. W. 651.

The State has the right to choose to whom and on what terms it will sell its products. 72 Am. Jur. 2d states, § 67; *Baldwin v. Montana Fish and Game Commission,* 56 L. Ed. 2d 354 (1978); *McCready v. Virginia,* 94 U. S. 391 (1876); *Geer v. Connecticut,* 161 U. S. 519 (1896); *Hughes v. Alexander Scrap Corporation,* 426 U. S. 794, 49 L. Ed. 2d 220, 96 S. Ct. 2488 (1976); *City of Philadelphia v. State of New Jersey,* Vol. 46 U. S. Law Week, No. 49, 4801, 4804.

Respectfully submitted,

/s/ John E. Phelps
Secretary-Treasurer
South Dakota Cement Commissioners

(Jurat omitted in printing.)

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

Nos. 78-1578, 78-1720 and 78-1721

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1720

Mullinax Concrete Service Company, a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

No. 78-1721

Russell's Ready Mix, Inc., a Corporation,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court for the District of South Dakota.

Submitted: October 19, 1978

Filed: November 7, 1978

Before LAY, ROSS and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

In 1919 the State of South Dakota, as authorized by its constitution, created a cement commission by legislative charter to carry out the manufacture, distribution and sale of cement as "works of public necessity and importance." S. D. Const. art. XIII, § 10; S. D. Compiled Laws Ann. § 5-17-1,-2,-9. *See generally Eakin v. South Dakota State Cement Comm'n,* 44 S. D. 268, 183 N. W. 651 (1921). In the past the Commission has operated a cement plant and has sold its products to out of state customers as well as to South Dakota residents. In recent months the demand for cement has risen sharply. Therefore, on June 1, 1978, the Commission reaffirmed a policy of supplying all South Dakota customers first and honoring all contract commitments, with the remaining volume being allocated on a first come, first served basis. As a result of this policy and the continuing cement shortage, the Commission refused to sell to out of state customers. Reeves, Inc., a Wyoming corporation, challenged this policy in federal district court. The district court, the Honorable Andrew Bogue presiding, found that such policy violated the Commerce Clause of the United States Constitution, U. S. Const. art. I, § 8, cl. 3, and enjoined its application to Reeves, Inc. Subsequently, Mullinax Concrete Service Co., a Wyoming corporation, and Russell's Ready Mix, Inc., an Iowa corporation, brought suit seeking a permanent injunction of the policy.[1] The court granted the requested relief in each case and permanently enjoined the Commission from taking any action to prohibit the sale of cement to prospective out of state purchasers because of their nonresidency. The State Cement Commission has filed this appeal. We reverse and remand to the district court with directions to vacate the injunctions.

The federal district court in issuing injunctive relief held:

> The South Dakota Cement Commission's policy of refusing to serve the Plaintiff simply because the corporation is not an entity within the boundaries of the State of South Dakota is declared to be a violation of the Commerce Clause and the Privilege [sic] and Immunities Clause of the United States Constitution.

Reeves, Inc. v. Kelley, No. 78-5060, slip op. at 3 (D. S. D. July 21, 1978).

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1 These suits were necessary since following the court's action in *Reeves, Inc. v. Kelley,* No. 78-5060 (D. S. D. July 21, 1978), the Commission adopted a "prioritization" policy, whereby all customers, resident or nonresident, were allowed to purchase an amount equal to 50 per cent of the average amount they had purchased over the last three years. Implementation of that policy or of any other policy requiring out of state sales before the needs of South Dakota customers were met, except as to Reeves, Inc., however, was enjoined by a South Dakota circuit court as violative of the South Dakota Constitution and laws. The Commission obeyed, thus giving rise to *Russell's Ready Mix, Inc. v. Kelley,* No. 78-5073 (D. S. D. Sept. 22, 1978), and *Mullinax Concrete Service Co. v. Kelley,* No. 78-5074 (D. S. D. Sept. 22, 1978). Those cases were consolidated with *Reeves, Inc.* for argument and decision on appeal.

Judge Bogue concluded:

> A state may not compel the confinement of their resources to their own people, whenever such hoarding and confinement impedes interstate commerce.
>
> This Court is aware of the fact that the South Dakota Cement Plant is publicly owned by the citizens of this state, for public use. It should be noted, however, that the Commission had made an election to become part of the interstate commerce system. Such an election was made when the Commission began selling to out-of-state entities, in competition with private industry. As a result of that election, the South Dakota Cement Plant is required to comply with the mandates of the United States Constitution, including the Commerce Clause and the Privilege [sic] and Immunities Clause.

Id. at 1-2.

The commerce clause[2] has been interpreted as primarily intended to inhibit the power of the states to interfere with the natural functioning of the interstate market through burdensome regulation or prohibition. *See City of Philadelphia v. New Jersey,* 98 S. Ct. 2531, 2535-37 (1978);[3] *Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794,

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2 We discuss application of the commerce clause only. The plaintiffs are all corporations, and corporations are not citizens within the meaning of the privileges and immunities clause, U. S. Const. art. IV, § 2, cl. 1. *Asbury Hosp. v. Cass County,* 326 U. S. 207, 210-11 (1945); *Paul v. Virginia,* 75 U. S. (8 Wall.) 168, 177 (1868).

3 In *City of Philadelphia v. New Jersey,* a decision relied upon by the plaintiffs, the Court struck down a New Jersey statute which prohibited importation of solid or liquid waste collected outside of New Jersey. The case stands for the principle that a state may not prevent shipment of privately

(Continued on next page)

806 (1976). In the instant case South Dakota has not attempted to pass any regulation or prohibition on any private industry functioning in commerce. It has simply acted in a proprietary capacity as a seller of cement within the interstate cement market. Such activity is not the type of state action the commerce clause was intended to restrict.

In *Hughes v. Alexandria Scrap Corp.,* the State of Maryland in an attempt to rid the landscape of junk cars paid a "bounty" to scrap processors for the destruction of inoperable automobiles over eight years old. An out of state processor was required to show title documentation in order to receive the bounty, whereas an in state processor was not. The result was a reduction in the bounties secured by out of state processors from the State of Maryland. A three judge district court concluded that the act constituted an impermissible burden on interstate commerce. The Supreme Court reversed, holding that the State of Maryland did not prohibit or regulate commerce but merely entered the market as a purchaser. In so holding the court said:

> Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and

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(Continued from previous page)

owned articles of trade in interstate commerce on the ground of local need or command. *See also Pennsylvania v. West Virginia,* 262 U. S. 553 (1923); *Oklahoma v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911). The Court specifically observed in *City of Philadelphia,* however:

> We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources. . . .

98 S. Ct. at 2537 n. 6.

exercising the right to favor its own citizens over others.

426 U. S. at 810.[4]

The State of South Dakota, in carrying out this proprietary activity possesses the rights of and is subject to the regulatory restrictions on any private business making marketing decisions. *See National League of Cities v. Usery,* 426 U. S. 833, 854 n. 18 (1976); *United States v. California,* 297 U. S. 175 (1936). If a private industry had chosen to market the cement, it would be difficult to argue that the United States Constitution would compel it to sell to nonresidents if it did not so choose. We fail to see that the State of South Dakota must be treated any differently, simply because it is a public body rather than a private industry. The mere fact that it at one time sold cement to out of state entities does not place greater restrictions on its business dealings. South Dakota could have chosen never to make its cement available to out of state customers, and the constitutional question, had it arisen, would not be analytically different from that presented by its recent decision to prefer its residents. *Hughes v. Alexandria Scrap Corp., supra,* 426 U. S. at 809, 817 (Stevens, J., concurring). Nothing in this range of possible marketing decisions affects the initial question whether the commerce clause limits South Dakota's power to choose whether, to whom, and on what conditions to sell its goods. We hold that the commerce clause does not.

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4 The fact that Maryland was a purchaser and South Dakota a seller is not a significant difference between *Hughes* and this case, since regulation of interstate products going either into or out of a state may offend the commerce clause. *Hughes v. Alexandria Scrap Corp., supra,* 426 U. S. at 808 n. 17.

While a state is similar to private business when it participates in the market in a purely proprietary capacity, it is also somewhat different. As a government providing a public service and utilizing the money and resources of its residents, it has a right and perhaps even an obligation to consider their common good and conserve their resources so long as it does not do so by attempting to regulate or control commerce among the states. *Toomer v. Witsell,* 334 U. S. 385, 409 (1948) (Frankfurter, J., concurring). The factual background in these cases does not indicate that South Dakota has attempted to control channels of interstate commerce. Accordingly, we hold the commerce clause does not prohibit the State of South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp., supra,* 426 U. S. at 810. *Cf. American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.,* 409 U. S. 904 (1972) (upholding the validity of state printing statutes which required all public printing of the state to be done in the state).

The causes are remanded with directions to the district court to vacate the injunctive relief issued and to dismiss the respective complaints in each case for failure to state a claim for relief.

It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Session, 1978

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

(Other captions omitted in printing)

Appeals from the United States District Court
for the District of South Dakota.

These causes came on to be heard on the original files of the United States District Court for the District of South Dakota and briefs of the respective parties and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby reversed.

And it is further ordered by this Court that these causes be and are hereby remanded to the said District

Court for proceedings consistent with the opinion of this Court.

November 7, 1978

(Cost information omitted in printing.)'

SUPREME COURT OF THE UNITED STATES

No. 78-1194

Reeves, Inc.,

Petitioner,

vs.

Tom Kelley et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the United States Court of Appeals in this cause is vacated with costs; and that this cause is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Hughes v. Oklahoma,* 441 U. S. — (1979).

IT IS FURTHER ORDERED that the petitioner, Reeves, Inc., recover from Tom Kelley et al. One Hundred Dollars ($100) for its costs herein expended.

May 14, 1979

(Statement of costs omitted in printing.)

JUDGMENT and OPINION IN QUESTION

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court
for the District of South Dakota.

Submitted: June 14, 1979

Filed: August 7, 1979

Before LAY, ROSS and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

The Supreme Court has remanded our decision, 586 F. 2d 1230 (8th Cir. 1978), for us to reconsider in light of its recent opinion in *Hughes v. Oklahoma,* 99 S. Ct. 1727 (1979). Upon review, we discern significant differences between the cases which cause us to adhere to our earlier holding that the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution, is not violated by the State of South Dakota's policy of preferential sale of cement it manufactures to South Dakota residents.

In *Hughes v. Oklahoma* the Supreme Court overruled *Geer v. Connecticut,* 161 U. S. 519 (1896). The Court rejected the legal fiction that a state owns wild game as a

representative of its citizens and the correlative theory that it could control not only the taking of game, but also its transportation out-of-state even after it was lawfully possessed by another, thereby preventing it from becoming an item of interstate commerce., 99 S. Ct. at 1731-33. Thus, the well established doctrine that a state may not discriminatorily regulate interstate commerce by giving its residents preferred access over out-of-state residents to local natural resources, *see, e. g., City of Philadelphia v. New Jersey,* 437 U. S. 617 (1978); *Pennsylvania v. West Virginia,* 262 U. S. 553 (1923); *West v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911), now applies as well to wild game.

Our original decision in *Reeves v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978), which upheld South Dakota's preference for in-state residents in its sale of cement, was not based on the rationale that the cement was a state controlled natural resource and therefore South Dakota could regulate or prohibit its trade in interstate commerce. *Reeves v. Kelley* presented the unusual situation in which the challenge was to a state, which as a manufacturer-seller faced with production demands it could not meet, made an administrative decision to give priority to meeting the needs of its residents. As our opinion pointed out, there was no allegation that South Dakota regulated or restricted out-of-state sale of privately manufactured cement or exercised its police powers to suppress competition in the manufacture or sale of cement. We held that South Dakota was acting in a proprietary capacity in the sale of a product it manufactured and that as such it had the right, as any other entrepreneur, to sell to whomever

it chose.[1] The issue remains whether the decision in *Hughes v. Oklahoma* affects our prior holding.

In both *Hughes v. Oklahoma* and *Geer v. Connecticut,* the state restricted out-of-state sale of wildlife reduced to possession and ownership private individuals. In contrast South Dakota has not attempted "to prevent privately owned articles of trade from being shipped and sold in interstate commerce . . . ." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 627 (1978), (quoting *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 10 (1928)). In entering the market and preferring residents in sales, South Dakota has not attempted to regulate commerce; it has not attempted to interfere with or usurp federal regulatory power.[2] While out-of-state purchasers such

1 A state may freely purchase to meet its needs. Although not in the context of a Commerce Clause challenge, the Supreme Court has written:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

Perkins v. Lukens Steel, Co., 310 U. S. 113, 127 (1940).

See also American Yearbook Co. v. Askew, 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.,* 409 U. S. 904 (1972).

2 The issue posed here is the constitutional restriction under the Commerce Clause on state action when Congress has been silent. A state engaging in business is subject to federal power to regulate commerce regardless of whether it acts in a proprietary or sovereign capacity, *see United States v. California,* 297 U. S. 175, 183-87 (1936), and may even be prohibited from selective marketing practices. *See Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794, 810 n. 19 (1976); *cf. Douglas v. Seacoast Products, Inc.,* 431 U. S. 265 (1977) (federal pre-emption of state fishing regulations). We hesitate to hold the Commerce Clause standing alone requires judicial scrutiny of a state's administrative marketing decisions to insure the least discriminatory alternative is chosen. *See* 80 Harv. L. Rev. 1357 (1967).

as Reeves may feel the effect of a reduced supply of cement in the interstate market, the effect is the result of a major supplier's temporary marketing decision, not unlike the market force exerted by Maryland's purchasing policies in *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794 (1976).

South Dakota has not sought to *regulate* interstate commerce in the sale of cement. We conclude that its action is more similar to Maryland's preference for its residents in its entry into the automobile scrap processing market, upheld in *Hughes v. Alexandria Scrap Corp.,* than conduct at which the prohibitions of the Commerce Clause have historically been directed.[3]

3 We recognize that Justices Brennan, White and Marshall are of the opinion that the type of state action does not influence application of Commerce Clause restrictions, *Hughes v. Alexandria Scrap Corp.,* 426 U. S. at 818 (Brennan, J., dissenting). We also recognize that *Hughes v. Alexandria Scrap Corp.* differs from *Reeves v. Kelley* in Maryland's use of market subsidies and its laudatory environmental goal. Nonetheless, *Hughes v. Alexandria Scrap Corp.* is the decision most analogous factually to the instant case, in which the state participates in the market place as a seller, and we therefore deem its analysis controlling. We are confronted with no other decision where the state, acting in a proprietary capacity, is challenged in its marketing decisions under the Commerce Clause alone. We fully recognize that dictum in earlier decisions provides pause for reflection on whether the distinction we make is a proper one. *See Baldwin v. G. A. F. Seelig, Inc.,* 294 U. S. 511, 522 (1935) (" '[A] state may not, in any form or under any guise, directly burden the prosecution of interstate business.' ") (quoting *International Textbook Co. v. Pigg,* 217 U. S. 91, 112 (1910)); *West v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911). In *West* the Court struck down a protectionist statute saying:

> The statute of Oklahoma recognizes [gas] to be a subject of intrastate commerce, but seeks to prohibit it

(Continued on next page)

We therefore abide by our previous holding that the Commerce Clause does not prohibit South Dakota "from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 810.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Continued from previous page)

> from being the subject of interstate commerce, and this is the purpose of its conservation. . . . If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retailiated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court.

Id. at 255-56

Yet these and other relevant decisions involve, in one form or another, state regulation of commercial transactions, and

(Continued on next page)

JUDGMENT

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

September Term, 1978

No. 78-1578

Reeves, Inc.,

Appellee,

vs.

Tom Kelley, Stan Frank, John E. Phelps, Al Sandvig and Dave Johnson, Members of the South Dakota Cement Commission,

Appellants.

Appeal from the United States District Court
for the District of South Dakota.

This Cause came on to be considered on the original files of the United States District Court for the District of South Dakota and briefs of the respective parties without oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

(Continued from previous page)

> are not apposite to the situation in which an administrative agency of a state, whose initial entry into the manufacture of cement was not made with a discriminatory motive, makes a self-serving marketing decision. If our distinction is incorrect, we think it better for the Supreme Court to make the pronouncement rather than for this court to furrow new ground.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinions of this Court filed November 7, 1978 and August 7, 1979.

August 7, 1979

(Statement of costs omitted in printing.)

FILED
NOV 16 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-677

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GUNDERSON, FARRAR, ALDRICH, WARDER & DEMERSSEMAN

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In The

Supreme Court of the United States

OCTOBER TERM, 1979

—o—

NO. 79-677

—o—

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Respondents.

—o—

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Petitioner contends that the Respondents (hereinafter referred to as "South Dakota"), violated the Commerce Clause of the United States Constitution when they withheld sales of State owned and manufactured cement to nonresidents until the needs of South Dakota residents had been met.

In two separate opinions (Pet. Appendix "A" and "C"), the Eighth Circuit Court of Appeals held that the Commerce Clause does not limit the State of South Da-

kota's power to choose whether, to whom, and on what conditions it sells its own manufactured goods, as opposed to those goods placed in the stream of commerce by private citizens.

———o———

QUESTION PRESENTED

1. Does the State of South Dakota violate the Commerce Clause by participating in the market and exercising the right to favor its own citizens over others in the sale of products manufactured and owned by the State?

———o———

STATEMENT

The State Cement Commission was organized in 1919, following passage by the citizens of the State of South Dakota of a constitutional amendment, Article XIII, § 10, declaring that the manufacture, distribution and sale of cement and cement products are "works of public necessity and importance in which the State may engage." (Pet. Appendix "H" p. 26).

During the year 1978 a serious shortage of manufactured cement arose in South Dakota. The public purpose of the Cement Plant, that is, to manufacture and sell cement to the citizens of South Dakota, was recognized by the Commission. This public purpose dictated and prompted the Commission to adopt a policy of fulfilling

the South Dakota demand for cement prior to any out of state sales (Pet. Appendix "E", "F").

The District Court held that this policy violated the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution (Pet. Appendix "D"). The Eighth Circuit Court of Appeals reversed the District Court, holding that the Commerce Clause does not prohibit South Dakota from participating in the market and exercising the right to favor its own citizens over others. *Reeves, et al. v. Kelley, et al.*, 586 F. 2d 1230 (8th Cir. 1978). A Petition for a Writ of Certiorari was filed in the Supreme Court of the United States. The Petition for Writ of Certiorari was granted and the judgment of the Court of Appeals was vacated and the case was remanded for further consideration in light of *Hughes v. Oklahoma*, 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979); *Reeves, Inc. v. Kelley*, — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979).

In its opinion on remand, the Eighth Circuit Court of Appeals carefully considered the Supreme Court's decision in *Hughes v. Oklahoma*, supra. The Appeals Court discerned significant differences between the cases. *Hughes v. Oklahoma* dealt with a direct state attempt to restrict the out-of-state sale of a natural resource after it had been reduced to private possession. In contrast, the State of South Dakota made no attempt to regulate or control the private sale of cement. Basing its decision on this fundamental distinction, the Court of Appeals abided by its previous holding that the Commerce Clause does not prohibit South Dakota "from participating in the market and exercising the right to favor its own citizens over others."

Hughes v. Alexandria Scrap Corp., 426 U. S. 810, 96 S. Ct. 2498, 49 L. Ed. 2d 231; *Reeves, Inc. v. Kelley*, 603 F. 2d 736 (8th Cir. 1979).

—o—

REASONS FOR REFUSING THE WRIT

Petitioner argues that the decision of the Court of Appeals should be reviewed because it is not in accord with previous decisions of this Court in the application of the Commerce Clause. In seeking review, the Petitioner claims reliance on "established constitutional principles . . . extending from *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23 (1824) to *Hughes v. Oklahoma*, supra." (Pet. p. 9).

Petitioner's reliance on the constitutional principles controlling these cases proceeds from a fundamental misconception of the difference between a State using its powers to restrict or burden commerce between citizens in interstate commerce and a State entering the marketplace and selling its own manufactured products. In the present case the State of South Dakota makes no attempt to regulate or control the exchange of private articles of trade in interstate commerce. Rather, South Dakota has made a marketing decision in the same manner as any private business has the right to do, to favor its own citizens in the sale of its own product in conformity with the public purpose embodied in the State's constitution (Pet. Appendix "H"). A far different question would have been presented to this Court if the State of South Dakota had enacted legislation prohibiting its citizens from selling

cement to nonresidents. In such a case, the constitutional precedents urged by the Petitioner clearly would be applicable, and such legislation would certainly be found to be the type of burden upon commerce which the Commerce Clause was intended to make suspect.

All of the cases relied upon by the Petitioner address the specific Commerce Clause prohibition that no State shall restrict a private citizen in the marketing of his property. No case relied upon by the Petitioner holds that a state is regulating commerce when it sells its own manufactured product. The Court of Appeals properly decided this case in accord with previous decisions of this Court. The lower court correctly distinguished the cases cited by Petitioner and relied principally upon *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976), concluding that the actions of South Dakota were most similar to Maryland's preference for its own residents in its entry into the scrap market.

In accordance with the directions of this Court, the Court of Appeals considered the decision of this Court in *Hughes v. Oklahoma*, 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). The Court of Appeals recognized significant differences between the cases. The dominant issue facing the Supreme Court in *Hughes v. Oklahoma*, supra, was whether or not a State could still lay claim to an ownership interest in wildlife within its borders even after the game had come into private hands. The significance of the case lies in the fact that the Supreme Court abandoned the legal fiction of such state ownership. In the present case there is no issue of ownership. The State

of South Dakota relies on no legal fiction to claim an ownership interest in its own manufactured product. Its ownership of cement is based on simple fact not legal fiction. Similarly, South Dakota has not maintained that through some legal fiction its ownership interest in the cement continues after the product comes into the possession of private parties such that it could restrict its sale to nonresidents. Rather, South Dakota maintains that until the State sells its product, thereby surrendering its ownership interest, the State is free to restrict its own sales in accordance with the legislative mandate of its creation and the Constitution of the State of South Dakota.

The holding of the Supreme Court in *Hughes v. Oklahoma,* supra, is supportive of South Dakota's position in the present case. The precise holding of *Hughes v. Oklahoma* was stated by the Court in the final sentence of the majority opinion, wherein the Court quoted the dissenting opinion of Justice Field in *Geer v. Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896):

> "*When* any animal, whether living in the waters of the State or in the air above, is lawfully killed for the purpose of food or other uses of man, it *becomes an article of commerce* and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Geer v. Connecticut,* supra, 161 U. S. at 538 (Emphasis supplied.)

Thus *Hughes v. Oklahoma* stands for the proposition that *when* a natural resource such as wildlife comes into private hands it then becomes an *article of commerce* and a State may not limit its use to its own citizens to the exclusion of nonresidents. The Court of Appeals' decisions below are entirely consistent with this holding. South Dakota in the exercise of its property rights in its own manufactured products may choose to sell to its own citizens before selling to nonresidents in accordance with the public purpose for which it was created. *When* its product has been sold, however, it becomes an *article of commerce* and the State of South Dakota could not thereafter restrict its movement in interstate commerce.

The Petitioner chooses to entirely ignore the type of state involvement in commerce, and instead maintains that every action of a State that may have an effect on interstate commerce is subject to Commerce Clause review. The Supreme Court expressly rejected this identical argument in *Hughes v. Alexandria Scrap Corp.,* supra:

> This line of reasoning is not without force if its basic premise is accepted. That premise is that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden. But we are not persuaded that Maryland's action in amending its statute was the kind of action with which the Commerce Clause is concerned. 426 U. S. at 805, 96 S. Ct. at 2495, 49 L. Ed. 2d at 228-29.

The Supreme Court in *Hughes v. Alexandria Scrap Corp.,* supra, reviewed the same cases relied upon by the Petitioner herein and concluded that "[t]he common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." 426 U. S. at 806, 96 S. Ct. at 2496, 49 L. Ed. 2d at 229. The Court then drew a clear distinction between the historical evils the Commerce Clause was designed to prevent and the type of State action presented in the case then before it:

> But until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.
>
> We do not believe the Commerce Clause was intended to require independent justification for such action. *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 808-09, 96 S. Ct. at 2497, 49 L. Ed. 2d at 230-31.

The Appeals Court recognized that *Hughes v. Alexandria,* supra, was the decision most factually analogous to the present case where the State participates in the market as the seller of its own manufactured product. *Reeves, Inc. v. Kelley,* 603 F. 2d 736, 738 (8th Cir. 1979), fn. 3. The State of South Dakota did not enter the cement market in 1919 with a discriminatory motive, but with the sole objective of meeting a critical shortage of cement within the State. *See generally Eakin v. South Dakota Cement Commission,* 44 S. D. 268, 183 N. W. 651 (S. D. 1921); Article XIII, Section 10, South Dakota Constitution; SDCL 5-17-1 (Pet. Appendix "H").

By entering the cement market the State of South Dakota created or substantially enlarged a market for cement that previously did not exist in a fashion similar to Maryland's subsidy of the scrap processing business. Viewed in the perspective of Justice Stevens' concurring opinion in *Hughes v. Alexandria Scrap,* supra, at 426 U. S. 814-17, the State of South Dakota by manufacturing cement for sale in the marketplace is creating new commerce, not restricting existing commerce between private parties. The State of South Dakota acting in a proprietary capacity is subject to the same regulatory restrictions

placed on private businesses acting in a similar capacity. *Perkins v. Lukens Steel Co.,* 310 U. S. 113, 127, 60 S. Ct. 869, 84 L. Ed. 206 (1940); *American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla), *aff'd mem.,* 409 U. S. 904 (1972). If a private business in South Dakota had chosen to produce and market cement, it could not be argued that the Commerce Clause would require such a private concern to sell to nonresidents if it chose not to do so. A decision by a private business not to market its product outside the State of its origin might well have an effect on the market supply of nonresident purchasers just as the temporary marketing decision of South Dakota in 1978 had some effect on the Petitioner herein. Yet the Supreme Court in *Hughes v. Alexandria Scrap,* supra, clearly enunciated the principle that not every action by a State that had the effect of reducing in some manner the flow of goods in interstate commerce creates an impermissible burden on commerce within the meaning of the Commerce Clause. It is only when a State attempts to exercise its governmental powers to regulate or restrict a private business from functioning in commerce, as was attempted by the State in *Hughes v. Oklahoma,* supra, that an impermissible burden on commerce is created under the Commerce Clause.

Finally, Petitioner asserts that the Court of Appeals' decision could lead to disastrous consequences by subordinating the federal free trade unit intended by our Constitution to the entry of States into commercial enterprises. The Petitioner's fears are unfounded. The decision of the Appeals Court does not leave States engaged in proprietary functions immune from Commerce Clause review. The Court of Appeals expressly recognized that

a State engaging in business is subject to the federal power to regulate whether engaged in proprietary or governmental activities. *Reeves, Inc. v. Kelley,* 603 F. 2d 736, 738, fn. 2 (8th Cir. 1979), *citing United States v. California,* 297 U. S. 175, 183-87, 56 S. Ct. 421, 80 L. Ed. 567 (1936). Congress has not elected to regulate commerce in cement. Thus, absent any such congressional action, "[n]othing in the purposes animating from the Commerce Clause forbids a State . . . from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.,* supra, 426 U. S. at 810, 96 S. Ct. at 2498, 49 L. Ed. 2d at 231.

CONCLUSION

The Court of Appeals correctly held that the Commerce Clause does not limit the State of South Dakota's power to choose whether, to whom, and on what conditions it sells its State owned and manufactured cement. The decision is in accord with the previous decisions of this Court in *Hughes v. Alexandria Scrap Corp.,* supra, and *Hughes v. Oklahoma,* supra.

It is therefore respectfully submitted that the Petition for Certiorari should be denied.

November, 1979.

Respectfully submitted,

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Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-677

REEVES, INC.,

Petitioner,

vs.

WILLIAM STAKE, RICHARD SAYRE, THOMAS ZELLER, AL SANDVIG, EDWIN GAISER, JOSEPH SIMMONS, ROGER PRUNTY, Members of the South Dakota Cement Plant Commission,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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In The

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OCTOBER TERM, 1979

—o—

NO. 79-677

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REEVES, INC.,

Petitioner,

vs.

WILLIAM STAKE, RICHARD SAYRE, THOMAS ZELLER, AL SANDVIG, EDWIN GAISER, JOSEPH SIMMONS, ROGER PRUNTY, Members of the South Dakota Cement Plant Commission,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

BRIEF FOR THE PETITIONER

—o—

CITATIONS TO OPINIONS BELOW

The United States District Court for the Western Division of the District of South Dakota entered a Restraining Order dated July 21, 1978, granting petitioner's Request for Injunctive Relief. This Restraining Order is unreported and is printed in the Appendix (App. 27). The opinion of the United States Court of Appeals for the

Eighth Circuit, dated November 7, 1978, is printed in Appendix (App. 35) and is reported as *Reeves, Inc. v. Kelley,* 586 F. 2d 1230 (8th Cir. 1978). The order of the United States Supreme Court, dated May 14, 1979, is printed in the Appendix (App. 43) and is reported as *Reeves, Inc. v. Kelley,* 441 U. S. 939, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979). The opinion of the United States Court of Appeals for the Eighth Circuit, dated August 7, 1979, is printed in the Appendix (App. 44) and is reported as *Reeves, Inc. v. Kelley,* 603 F. 2d 736 (8th Cir. 1979).

—o—

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 7, 1979 (App. 49).

The petition of Reeves, Inc. for a writ of certiorari was filed on October 25, 1979, and granted on January 14, 1980.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

—o—

QUESTION PRESENTED

1. Does the State of South Dakota, which owns and operates a cement plant, and which has for many years sold substantial amounts of its product in interstate commerce, violate the Commerce Clause of the United States Constitution by adopting and enforcing a policy which limits the sale of its cement to South Dakota residents first before making cement available for purchase by non-residents of the State of South Dakota?

—o—

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitution of the United States of America, Article I, Section 8, Clause 3 provides:

> "Section 8. The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

The South Dakota Constitution, Article XIII, Section 10, states:

> "The manufacture, distribution and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase or appropriation, all lands, easements, rights of way, tracts, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material, incident or necessary to carry the provisions of this section into effect: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made, except upon a vote of two-thirds of the members elected of each branch of the Legislature."

South Dakota Compiled Laws § 5-17-1 (1974) states:

> "The people having adopted amendments to our state Constitution to the effect that the manufacture, distribution, and sale of cement and cement products are works of public necessity and importance in which the

state may engage, it is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such governmental functions subject to regulation by the state." (Source: Session Laws 1919, Ch. 324, § 2.)

South Dakota Compiled Laws § 5-17-2 (1974) prior to its amendment effective April 22, 1979, by "Executive Reorganization Order No. 2 of 1979", 1979 South Dakota Session Laws, Ch. 352, p. 370, provided as follows:

> "There is hereby created a state cement commission. The Commission shall consist of five (5) members to be appointed by the Governor for terms of five (5) years. No more than four (4) members may be members of the same political party. Any member appointed to fill a vacancy arising from other than the natural expiration of the term shall serve only for the unexpired term. The commission shall annually choose from its membership a chairman, vice-chairman, and secretary-treasurer. No member may be removed from office except for cause." (Source: Session Laws 1919, Ch. 324, § 2; 1927, Ch. 199, § 1; 1957, Ch. 287; 1974, Ch. 3, § 35.)

South Dakota Compiled Laws § 5-17-2, as amended April 22, 1979, by "Executive Reorganization Order No. 2 of 1979", 1979 South Dakota Session Laws, Ch. 352, p. 370, §§ 14, 16, 18 (S. D. C. L., Supp. 1979) now provides:

> "The state cement commission is abolished. The South Dakota state cement plant commission is created. The commission shall consist of seven members to be appointed by the Governor. Members shall serve a four-year term. No more than five members shall be members of the same political party. The terms of members of the South Dakota state cement plant commission who are first appointed after the effective date of

this order shall be: two appointed for a term of one year; two appointed for a term of two years; two for a term of three years; and one for a term of four years, and such initial terms shall be designated by the Governor. Any member appointed to fill a vacancy arising from other than the natural expiration of a term shall serve only for the unexpired term, but may be reappointed to a full term. The commission shall annually choose from its membership a chairman, a vice-chairman, and a secretary-treasurer. No member shall be removed from office except for cause."

South Dakota Compiled Laws § 5-17-9 (1974) states:

> "The state cement commission is hereby empowered and authorized to operate the South Dakota state cement plant located at Rapid City, South Dakota, to sell the products produced at said plant, to fix the price of such products and to determine the manner and methods of the terms under which such products shall be sold, to advertise such products to the public in such manner as the commission shall deem proper, and to do all things in the operation of such plant and the sale of its products as the commission may deem necessary or expedient to the successful operation of said plant." (Source: Session Laws 1925, Ch. 282, § 1; 1949, Ch. 220, § 1.)

South Dakota Compiled Laws § 5-17-2.1 (1974) prior to the "Executive Reorganization Order No. 2 of 1979", 1979 South Dakota Session Laws, Ch. 352, p. 370, provided:

> "The state cement commission and the state cement plant under its control shall comprise a principal department of state government."

South Dakota Compiled Laws, Supp., 1979, indicates that South Dakota Compiled Laws § 5-17-2.1 (1974) was superseded by § 5-17-2.3 (Supp. 1979) created by "Execu-

tive Reorganization Order No. 2 of 1979", 1979 South Dakota Session Laws, Ch. 352, p. 370, §§ 15, 19.[1] South Dakota Compiled Laws § 5-17-2.3 (Supp. 1979) now states:

> "The South Dakota cement plant commission shall control and manage the state cement plant, and for reporting purposes only, it is attached to the department of commerce. The South Dakota cement plant commission shall have all quasi-judicial, quasi-legislative, special budgetary and statutory functions previously performed by the state cement commission. The South Dakota cement plant commission shall perform and assume all the statutory, regulatory and other functions of the former state cement commission."

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STATEMENT

Reeves, Inc., the petitioner, is a corporation organized and existing under the laws of the State of Wyoming, with its principal place of business at Buffalo, Wyoming. Reeves is engaged in the sale of concrete and concrete products and conducts its business in a three-county area located in Sheridan, Johnson and Campbell Counties, Wyoming. Reeves supplies approximately 54% of the consumers who purchase concrete within its market area. Petitioner receives 100% of its cement, a necessary ingredient in the production of concrete, from outside the State of Wyoming (App. 4, 15).

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1 It would appear from a reading of "Executive Reorganization Order No. 2 of 1979" that South Dakota Compiled Laws § 5-17-2.1 (1974) was only changed to require that reports from the cement plant commission go through the department of commerce and that the cement plant commission remains a principal department of South Dakota state government.

Respondents are members of the South Dakota Cement Plant Commission, appointed pursuant to *South Dakota Compiled Laws*, § 5-17-2 (Supp. 1979), to administer and control the South Dakota cement plant at Rapid City, South Dakota. The state cement plant commission is a department of state government as set forth in *South Dakota Compiled Laws* § 5-17-2.1 (1974) and *South Dakota Compiled Laws* § 5-17-2.3 (Supp. 1979). The state cement commission (now succeeded by the South Dakota State Cement Plant Commission) was organized in 1919 following passage by the citizens of South Dakota of a constitutional amendment, Article XIII, Section 10, declaring that the manufacture, distribution and sale of cement and cement products are "works of public necessity and importance in which the State may engage." (Article XIII, § 10, Constitution of South Dakota.)

The South Dakota Cement Plant Commission has engaged in interstate commerce. Since the establishment of the state cement plant more than fifty years ago, cement has been manufactured and sold to both consumers residing in the State of South Dakota and consumers residing outside the State of South Dakota (App. 5-6; Pl. Ex. 3, App. 26, Tr. of Hearing at 4). It is the only cement mill in the State of South Dakota. The market area for the sale of cement by the South Dakota Cement Plant Commission to its consumers included the following states in addition to the State of South Dakota: North Dakota, Minnesota, Nebraska, Iowa, Montana, Colorado and Wyoming (Pl. Ex. 3, App. 26, Tr. of Hearing at 4). During the calendar year of 1977, the state cement plant shipped 279,877 tons of cement, or approximately 48% of its total shipment to out-of-state consumers. In 1977, 100,922 tons of

cement were shipped to the State of Wyoming (Pl. Ex. 3, App. 26, Tr. of Hearing at 4).

Since its inception in 1958 and through 1977, Reeves, Inc. has purchased approximately 95% of its cement needs for its operations from the state cement plant in Rapid City, South Dakota (App. 4, 15). For the period including January 1, 1975 through June 30, 1978, Reeves had purchased from the state cement plant the following dollar volumes:

1975	$ 871,000.00
1976	824,000.00
1977	1,172,000.00
1978 (to June 30, 1978) (App. 5)	235,000.00

During the mid-year of 1978, a serious shortage of cement was experienced both regionally and nationally. The shortage was caused by a variety of factors including production problems at the South Dakota cement plant (App. 13). On June 1, 1978, the state cement plant commission, after discussing the cement shortage existing "throughout the country" (App. 13), took the following action:[2]

> "The Commission reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commitments, with the remaining volume allocated on a first come first serve basis." Minutes of South Dakota Cement Plant, June 1, 1978, p. 3 (App. 13).

As a result of this policy and the continuing cement shortage, the state cement plant commission refused to

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2 The policy was previously expressed at a meeting of the South Dakota Cement Commission held on June 26, 1974 (See Pl. Ex. 1, App. 24-25, Tr. of Hearing at 4).

sell cement to Reeves, Inc., a Wyoming corporation (App. 7, 18). On July 19, 1978, Reeves, Inc. filed its complaint in the United States District Court for the District of South Dakota, Western Division, seeking declaratory and injunctive relief, including a temporary restraining order and preliminary injunction (App. 3-14).

On July 21, 1978, the Honorable Andrew W. Bogue entered a restraining order prohibiting the respondents from refusing to serve the petitioner simply because the petitioner was not an entity located within the boundaries of the state of South Dakota and declaring the policy adopted by the respondents a violation of the Commerce Clause and Privileges and Immunities Clause of the United States Constitution.[3] The Court found no sub-

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3 Following the decision of Judge Bogue on July 21, 1978, the state cement plant commission met on July 27, 1978, and adopted a policy which allocated cement under a "prioritization allocation schedule." This schedule gave first priority in cement to all public improvement projects within South Dakota; second priority to all health care facilities within South Dakota; third priority to all contract commitments within and without the state; and the remaining balance of cement allocated on the basis of any customer's average purchase over the past five years. On August 5, 1978, the commission rescinded its July 27, 1978 policy and adopted the so-called "Fifty Percent Allocation Policy" which allocated cement to any customer, resident or non-resident, on the basis of 50 percent of the average amount purchased by that customer over the previous three years. The State of South Dakota then brought suit against the members of the state cement commission in a South Dakota Circuit Court seeking to enjoin the implementation of that policy. On October 5, 1978, the South Dakota Circuit Court entered its decision finding that the policy violated the South Dakota Constitution and laws. The Circuit Court enjoined the commission from implementing any policy other than a policy which granted a priority to South Dakota

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stantial issues of material fact and consolidated the first hearing as a final hearing and issued a permanent injunction based on the pleading, affidavits and evidence presented at a hearing on July 19, 1978 (App. 27-30).

On appeal, the United States Court of Appeals, Eighth Circuit, remanded the cause to the District Court with directions to vacate the injunction granted to the petitioner, and to dismiss the Complaint for failure to state a claim for relief. Not applying the Privileges and Immunities Clause, the United States Court of Appeals, Eighth Circuit, concluded that the Commerce Clause does not limit South Dakota's power "to choose whether, to whom, and on what conditions to sell its goods." *Reeves, Inc. v. Kelley,* 586 F. 2d 1230, 1232 (8th Cir. 1978) (App. 35-41). Such activity was not considered by the Court of Appeals as the type of activity that the Commerce Clause was enacted and intended to prevent. On November 16, 1978, Andrew W. Bogue, United States District Judge, vacated the injunction issued by the District Court on July 21, 1978, and ordered the action dismissed.

On January 31, 1979, Reeves, Inc. filed a Petition for a Writ of Certiorari to the United States Court of Ap-

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residents. Reeves, Inc. was excepted from the restraining order. The commission apparently observed the Circuit Court order. See Footnote 1. *Reeves, Inc. v. Kelley, et al.,* 586 F. 2d 1230 (8th Cir. 1978) (App. 37). The memorandum decision of the Honorable Robert A. Miller, Circuit Judge, in *William J. Janklow, ex rel. State of South Dakota, et al. v. Kelley, et al.* is unreported and is printed as Appendix A to this brief and the subsequent permanent writ of prohibition and writ of mandamus, dated October 23, 1978, is printed as Appendix B hereto. None of the parties to the South Dakota action filed an appeal.

peals for the Eighth Circuit in the Supreme Court of the United States. On May 14, 1979, the Petition for a Writ of Certiorari was granted and the Judgment of the United States Court of Appeals for the Eighth Circuit was vacated and the case remanded for further consideration in light of *Hughes v. Oklahoma,* 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). *Reeves, Inc. v. Kelley,* 441 U. S. 939, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979) (App. 43).

On remand, the United States Court of Appeals for the Eighth Circuit issued its opinion in which it refused to apply *Hughes v. Oklahoma, supra,* and continued to abide "by our previous holding that the Commerce Clause does not prohibit South Dakota 'from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp.,* 426 U. S. at 810." *Reeves, Inc. v. Kelley,* 603 F. 2d 736, 738-739 (8th Cir. 1979) (App. 44-48). The U. S. Court of Appeals distinguished *Hughes v. Oklahoma, supra,* on the basis that South Dakota had not "attempted" to prevent articles of trade reduced to possession and ownership by private individuals from being shipped and sold in interstate commerce.

On October 25, 1979, Reeves, Inc. again filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The petition was granted on January 14, 1980.

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SUMMARY OF ARGUMENT

I.

By adopting and enforcing a policy to prefer all South Dakota residents over non-residents in the sale of state-owned and state-produced cement, the respondents, members of the South Dakota Cement Plant Commission, directly discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3. State ownership of an article of commerce does not justify significant burdens placed by the state on the interstate commerce of cement. Nor does state ownership of an article of commerce remove it from the limitations imposed under the Commerce Clause. Whether a state imposes burdens upon interstate commerce by placing restrictions on private individuals and businesses or placing restrictions on or through its own governmental agencies, the effect is the same. The state cannot escape the power of the Commerce Clause by changing the form in which it imposes direct burdens upon interstate commerce. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935); *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell*, 424 U. S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976); and *City of Philadelphia v. New Jersey*, 437 U. S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978).

This court long ago recognized that a state cannot hoard its natural resources for the sole or principal use of its citizens where private industry had previously submitted the resources to the channels of interstate commerce. *West v. Kansas Natural Gas Co.*, 221 U. S. 229,

31 S. Ct. 564, 55 L. Ed. 716 (1911); *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928). As Alaska's ownership of a valuable resource in *Hicklin v. Orbeck*, 437 U. S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), did not remove discriminatory state action from the limitations of the Privileges and Immunities Clause, neither does South Dakota's ownership of its cement remove the preferential policy for South Dakota residents from review under the Commerce Clause.

Attempts to justify the preferential policy adopted by the state of South Dakota as a marketing decision is contrary to the facts presented. The state of South Dakota was not increasing sales by adoption of the preferential policy since the demand for cement, even in the state of South Dakota, had exceeded the supply available from the cement plant. To equate the adoption of the policy as a marketing decision similar to one performed by private industry ignores the practical realities of economic life. Differences between private enterprise and functions of the state exercisable through its police powers make the comparison unreasonable and do not support a marketing decision. The Commerce Clause creates an area of trade free from interference by the states without implementing legislation by Congress. *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell, supra.* The regulation of interstate commerce in the sale of cement occurred when the preferential policy adopted by the state of South Dakota was enforced. The result was an elimination of competition for the purchase of its cement by consumers in Wyoming, North Dakota, Minnesota, Nebraska, Montana and Colorado. It

was not a marketing decision. It was a decision designed to place the state in economic isolation by direct and deliberate impediment to the free flow of goods in interstate commerce.

II.

The holding in *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976) does not warrant exclusion from review under the Commerce Clause of state action which amounts to economic protectionism. The purchasing activity of Maryland in *Hughes v. Alexandria Scrap Corp., supra,* provided the State of Maryland with the means to accomplish a laudable local and national goal of maintaining a clean environment. However, the actions of the state of South Dakota in adopting a policy preferring its own residents over out-of-state residents in the sale of cement was a means to place the state of South Dakota and its residents in economic isolation. As such the South Dakota Cement Plant Commission placed the parochial economic interests of South Dakota above the nation's economic goals expressed in the Commerce Clause. *Hughes v. Alexandria Scrap Corp., supra,* did not erect a direct and deliberate barrier to the free flow of goods in interstate commerce but sought to promote a legitimate local and national concern in maintaining a clean environment.

III.

Upon Commerce Clause review, the preferential policy of South Dakota fails to pass constitutional muster. The action of the respondents is one of those clear examples referred to by the Court in *City of Philadelphia*

v. New Jersey, supra, in which a state undeniably stops the flow of commerce at the limits of its borders and as a result is *per se* invalid. Subjecting the preferential policy to the rule enunciated in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), there is no valid justification for the imposition of the burden which would be overcome by its benefit to local interests. *Hughes v. Oklahoma,* 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979); and *H. P. Hood & Sons v. DuMond,* 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949). Respondents maintain that the original enabling legislation and constitutional amendment impress the cement plant with such works of public necessity as to permit the preference for South Dakota residents. To allow states to engage in the national marketplace during times of shortages of valuable resources and to disrupt the flow of commerce by granting preference to its own citizens will set up the blueprint for states to engage in economic protectionism. When such actions by states are not done to shield citizens from fraud or immorality, or to insure the health and safety of its citizens, but rather to provide them with greater economic opportunity, the state action is inconsistent with the Commerce Clause as interpreted in *Pike v. Bruce Church, Inc., supra; Hughes v. Oklahoma, supra;* and *H. P. Hood & Sons v. DuMond, supra.* The action of the respondents was not the least discriminative alternative to insure usage by its residents of cement during a time when the demand far exceeded the supply. Such economic isolationism is repugnant to the Commerce Clause of the United States Constitution.

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ARGUMENT

I.

State ownership of a valuable resource does not remove a policy of preferential treatment from the negative implications of the Commerce Clause.

This case deals with a state policy instituted and enforced by an agency of the state of South Dakota to prefer all South Dakota residents over non-residents in sales of state-owned and state-produced cement. This state action has placed a significant burden on the interstate commerce of cement. The showing by this petitioner alone indicates that the force and effect of the policy adopted by the South Dakota Cement Commission was not an incidental burden on interstate commerce. Reeves, Inc. was forced to lay off numerous employees and suffered a reduction of 76% of its production capacity. Its principal supply of cement for two of its operations in Wyoming was completely cut off in July of 1978 (App. 19-20).

The Respondents attempt to justify this significant burden on interstate commerce by claiming that the operation of the cement plant was instituted by the State for a public purpose under enabling legislation (*South Dakota Compiled Laws,* § 5-17-1 (1974)), and that the ownership by the state of the article of commerce, in this case the cement, removes it from review and implications of the Commerce Clause.

But state ownership is not the sole criterion for consideration or application of the Commerce Clause to activities by a state. The Supreme Court has traditionally

focused on the effect of the state action on interstate commerce rather than on the type of state activity involved in determining whether the statute involves an impermissible burden on interstate commerce. See *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell,* 424 U. S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976); and *City of Philadelphia v. New Jersey,* 437 U. S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978). When a state, as the State of South Dakota, has entered the interstate market with an article of commerce owned and produced by the state, it cannot claim an exclusion from review under the Commerce Clause.

The Commerce Clause is a polestar by which this nation is guided in the federal free trade unit. Judicial review of all state action alleged to be a burden on commerce is necessary to remove state obstacles to commerce and achieve the purpose underlying the Commerce Clause. When focusing on the effect of the state action involved in this case, rather than on the type of state activity involved, it becomes clear that the purpose of the Commerce Clause can only be maintained by a review of state activity in any form which burdens interstate commerce.

In *Baldwin v. G. A. F. Seelig, Inc.,* 294 U. S. 511, 522, 55 S. Ct. 497, 79 L. Ed. 1032 (1935), the Court, quoting *International Textbook Co. v. Pigg,* 217 U. S. 91 (1910) stated that:

> "'[A] state may not in any form or under any guise, directly burden the prosecution of interstate business.'"

The distinction that an article of commerce is state owned or under state control as opposed to being privately owned should be ignored. The question to be answered is

not based on the "niceties of 'title' " but whether the state exercised its power in conformity with the Commerce Clause of the United States Constitution. *Hughes v. Oklahoma,* 441 U. S. 322, 333, 99 S. Ct. 1727, 1735, 60 L. Ed. 2d 250 (1979).

Hughes v. Oklahoma, supra, adds support to long established constitutional principles governing the Commerce Clause expressed in *West v. Kansas Natural Gas Co.,* 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911); *Pennsylvania v. West Virginia,* 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); and *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928); that a state cannot hoard its resources, *natural or created,* for the sole or principal use of its residents.

This court previously held in *Hicklin v. Orbeck,* 437 U. S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978) that Alaska's ownership of its oil and gas was not a sufficient justification for discrimination against hiring non-residents under a Privileges and Immunities challenge. In fact, the court in that case relied on the Commerce Clause principles to support its holding:

> ". . . *West* and *Pennsylvania v. West Virginia* thus established that the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for that State's residents. *Foster Packing Co. v. Haydel,* 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928), went one step further; it limited the extent to which a State's purported *ownership* of certain resources could serve as a justification for the State's economic discrimination in favor of residents . . ."
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> "*West, Pennsylvania v. West Virginia,* and *Foster Packing* thus establish that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce."
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> ". . . Although the fact that a state owned resource is destined for interstate commerce does not, of itself, disable the State from preferring its own citizens in the utilization of that resource, it does inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource . . ." 437 U. S. at 532-533, 98 S. Ct. at 2491-2492. (Emphasis in original.)

As state ownership of a valuable resource does not remove state action from review under the Privileges and Immunities Clause, neither does state ownership remove state action from review under the Commerce Clause.

The Respondents claim, and the court below advanced the concept, that the state as owner of the cement was merely making a marketing decision concerning its own products with regard to whom and on what terms it wished to sell its product. However, the record cannot support that the preference granted to South Dakota residents by the South Dakota Cement Commission is the result of a conscious market decision. The Respondents and the Court below erred by assuming something that doesn't exist. At the time Reeves, Inc. filed its action, South Dakota Cement Commission had no surplus of cement. Indeed, the president of the South Dakota Cement Commission had been instructed by the cement plant commission to attempt to buy cement from other sources

to meet contract commitments (App. 13). The respondents claimed that the demand in South Dakota alone exceeded the supply of cement produced by the state cement plant (Tr. of Hearing, at 16; App. 31-32).

The preferential policy could not increase sales because demand for cement far exceeded the supply. By making the preference, the state did not sell any more cement than if it had continued to sell cement out of state. The benefit to be realized by enforcing the preferential policy was not to be gained by the South Dakota Cement Plant itself, but was to provide economic protectionism for the residents of the state of South Dakota. To find that the policy resulted from marketing decisions designed to promote the business of the state cement plant is a "specious" finding.

The equating by the court below of the State's activity in manufacturing and selling cement with private industry ignores the practical realities of economic life. The functions and goals of private enterprise in seeking profits and gains for its own existence are much different than the functions of the state, exercisable through its police powers, serving its citizens. The distinction is even set forth in the enabling legislation of cement plants, *South Dakota Compiled Laws,* § 5-17-1 (1974):

> ". . . [I]t is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such *governmental functions subject to regulation by the state.*" (Emphasis supplied.)

Whether or not private industry would be free to restrict sales in a similar manner as did South Dakota

is not persuasive to excluding state action from Commerce Clause review. The fact that Congress does not exercise its power does not limit the federal power granted under the Commerce Clause to regulate commerce among the states. See *City of Philadelphia v. New Jersey, supra;* and *Raymond Motors Transp., Inc. v. Rice,* 434 U. S. 429, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978).

The Commerce Clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but its own force creates an area of trade free from interference by the states. The Commerce Clause, even without implementing legislation by Congress, is a limitation upon the power of the states. *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell,* 424 U. S. 366, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976).

The Court below further erred in finding that "South Dakota has not sought to *regulate* interstate commerce in the sale of cement." 603 F. 2d at 738. (Emphasis in original.) (App. 47). This finding is without foundation in the record. Obviously South Dakota sought to regulate interstate commerce by eliminating competition for the purchase of its cement by consumers in Wyoming, North Dakota, Minnesota, Nebraska, Montana and Colorado. When approximately 48% of its cement was shipped out of state during the year 1977, a facial attempt to significantly reduce out-of-state sales of cement can hardly be described as anything else but an attempt to regulate interstate commerce. Only by regulating the interstate commerce of cement could the cement plant commission accomplish its avowed purpose of serving

South Dakota residents first. The question is not whether or not the commission regulated interstate commerce, it is whether or not the state had the right to do it. The state of South Dakota does not have that right under the Commerce Clause of the U. S. Constitution. Thus, its actions are subject to judicial scrutiny entailing "a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of business involved and the actual effect on the flow of commerce." *Di Santo v. Pennsylvania,* 273 U. S. 34, 44, 47 S. Ct. 267, 271, 71 L. Ed. 524 (1927) (Stone, J., dissenting).

II.

Hughes v. Alexandria Scrap Corp. does not grant immunity to a state from the restrictions of the Commerce Clause when the state action amounts to economic protectionism.

The court below relies heavily on *Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976) to establish the state's right to market the cement without the considerations and limitations which may be imposed by the Commerce Clause. The United States Court of Appeals, Eighth Circuit, states in its opinion below, dated August 7, 1979:

> "South Dakota has not sought to *regulate* interstate commerce in the sale of cement. We conclude that its action is more similar to Maryland's preference for its residents in its entry into the automobile scrap processing market, upheld in *Hughes v. Alexandria Scrap Corp.;* than conduct at which the prohibitions of the Commerce Clause have historically been directed.

> "We therefore abide by our previous holding that the Commerce Clause does not prohibit South Dakota 'from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp.,* 426 U. S. at 810." *Reeves v. Kelley,* 603 F. 2d at 738-739.

In *Hughes v. Alexandria Scrap Corp., supra,* the court upheld a Maryland statute designed to encourage the disposal of abandoned automobiles through payments of cash bounty to scrap processors even though the distribution of the bounties favored in-state interests. The distribution of the bounties were unequal because documentation requirements were different for out-of-state processors than those imposed on processors with plants in Maryland.

The court below equated the "purchasing" by Maryland in *Hughes v. Alexandria Scrap Corp., supra,* to the "selling" by South Dakota of its cement. However, the contrast of the *Hughes v. Alexandria Scrap Corp.* decision and the case presented here lies in the ultimate purpose served by the actions of the state. The purchasing activity of Maryland in *Hughes v. Alexandria Scrap Corp.* was used as a means to promote and accomplish the state's governmental goal of maintaining a clean environment. In contrast, the actions of the state cement plant commission, in adopting a policy of preferring its South Dakota residents in the sale of cement, were not taken to promote or accomplish any governmental ends of the state itself but to provide its residents with an economic advantage to state-owned resources. Even the majority of *Hughes v. Alexandria Scrap Corp., supra,* recognized that barriers erected based on the economic laws of supply and demand are prohibited by the Commerce Clause:

> ". . . [T]his Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." 426 U. S. at 803, 96 S. Ct. at 2494.

It is acknowledged that under certain circumstances and within certain limits a state may be permitted to favor its own inhabitants in the purchase of goods or services. However, such state action cannot be undertaken for the forbidden purpose of placing the state in economic isolation by direct and deliberate impediment to the free flow of goods in interstate commerce. Respondents base their preferential treatment of South Dakota residents on statutory and constitutional language indicating that the cement plant is endowed with a public purpose. The statute and constitution, however, do not specify what kind of public purpose is involved, nor does it really matter. See *Lacoste v. La. Dept. of Conservation,* 263 U. S. 545, 550, 44 S. Ct. 186, 188, 68 L. Ed. 437 (1924). It is submitted that the action taken by the respondents to limit the interstate transportation of cement in times of shortage is an act of economic protectionism which places South Dakota's parochial economic interests above the nation's economic goals expressed in the Commerce Clause. This is in contrast to *Hughes v. Alexandria Scrap Corp., supra,* which involved a legitimate local and national concern in maintaining a clean environment.

It is recognized that a state may need to purchase items to meet its needs *as a state.* But that concept cannot be extended to mean that a state may purchase to meet all the needs *of its citizens.* A distinction must be made between the manner in which the state agencies or

officers function when advancing governmental services to its citizens, and the manner in which it protects its residents from the economic law of supply and demand. *Hughes v. Alexandria Scrap Corp., supra,* is limited to those instances when a state exercises its police power to promote a goal that may be considered a traditional governmental function. The extension of *Hughes v. Alexandria Scrap Corp., supra,* to state action which burdens interstate commerce for non-governmental objectives, i. e. the economic protection of its citizens, is in error. South Dakota actively and voluntarily participated in the interstate market in the sale of cement to customers in several states. The vitality of its business is even related to its sales to non-residents. The restraining order of July 21, 1978, issued by Judge Bogue in the District Court states:

> "The Court is aware of the interest and desires of the defendants to satisfy both the residents of South Dakota and of out-of-state residents. It realizes that the defendants are cognizant of the fact that non-residents have, in the past, been loyal users of South Dakota cement, to the financial benefit of South Dakota . . ." *Reeves, Inc. v. Kelley,* Restraining Order at 2 (D. S. D. July 21, 1978) (App. 28).

It is submitted that South Dakota preempted private enterprise on the interstate market of cement in its present market area. South Dakota cannot now step in or out of interstate commerce or the national marketplace without having a ripple effect throughout the federal free trade unit. Disruption of supplies of cement from South Dakota create new demands on other sources of cement available throughout the national marketplace. It has been shown earlier in this Argument that the decision of the South Dakota Cement Commission did not result in

any increased sales by the plant inuring to the benefit of the state itself. Rather, a constitutionally impermissible burden was placed on interstate commerce with the express purpose of protecting residents of South Dakota from the increasing demands for cement by non-residents of the state. Such state action is subject to judicial review under the Commerce Clause.

III.

South Dakota's policy of preferring its citizens in the sale of cement is impermissible under rules evolved by the Commerce Clause.

Subjecting to Commerce Clause review the policy of South Dakota granting its citizens a preference in the sale of state-owned cement reveals that the policy imposes an impermissible burden upon interstate commerce in violation of the general rules articulated in previous Commerce Clause cases.

The general test, which was refined in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970) was reiterated in *Hughes v. Oklahoma,* 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979):

> "Under that general rule we must inquire (1) whether the challenged statute regulates even-handedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." 441 U. S. at 336, 99 S. Ct. at 1736.

It has already been pointed out in this brief that the policy adopted by the South Dakota Cement Commission had more than an incidental effect on interstate commerce and, in fact, resulted in a significant burden on interstate commerce. The petitioner, having to rely solely on the interstate market of cement for the operation of its business, had its principal supply of cement cut off by the action of the respondents. Because of the existing problems in production and the high demand for cement in the area, South Dakota's claim for a preferential treatment resulted in a blockage of the cement outside of the borders of the state except in those instances where previous contract commitments had been made by the cement plant commission.

Such state action was not only a significant burden on interstate commerce, it was a facial discrimination against out-of-state businesses. It was an intentional attempt to insulate the state of South Dakota from outside competition. Its practical effect was to do exactly what it was intended to do—to protect the parochial interests of the state of South Dakota. As an action which undeniably stops the flow of commerce at the limit of a state's borders, the policy is *per se* invalid in accordance with the rule in *City of Philadelphia v. New Jersey,* 437 U. S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978).

This state action cannot be fairly viewed as being directed to legitimate local concerns with incidental effects on interstate commerce. Rather, the action of the respondents was designed to protect the state's economy, not its environment nor any other laudable governmental service. As the policy exists, it is a patent discrimination

against interstate trade and is impermissible under the rulng of *City of Philadelphia v. New Jersey, supra.*

If the court were to examine whether the preferential policy serves a legitimate local purpose, it will be found that the state of South Dakota is not promoting a traditionally recognized local interest. Respondents rely on the South Dakota Constitution, Article XIII, Section 10, adopted by the citizens of South Dakota in 1918 and the subsequent enabling legislation adopted in 1919 (*South Dakota Compiled Laws,* § 5-17-1 (1974)), to assert that the avowed purpose of the formation of the state cement plant commission was for works of public necessity and impressed with a public use for the state of South Dakota. Respondents seek support for this avowed public purpose by referring to *Eakin v. South Dakota State Cement Commission, et al.,* 44 S. D. 268, 183 N. W. 651 (S. D. 1921), which upheld the statutes creating the cement commission and the issuance and sale of bonds for financing the cement plant. The South Dakota Court in 1921 found that:

> "[C]ement and its products are commodities that are necessary to the people of this state; that they cannot be procured through individual effort; that, in the construction of highways, bridges, street paving, sidewalks and public buildings within this state, cement is a necessary material, and for such construction there are required more than 1,000 barrels of cement per day; that cement and cement products are also necessary materials for the construction of homes and other structures not hereinbefore referred to; that the use of cement is rapidly increasing in this state as elsewhere; that a serious shortage in the supply of cement is threatening the people of this state; that there has been a shortage many times during the past two years and at times such shortage has interfered with and delayed both public and private enterprises; that the materials for the making of cement are found in large quantities and at accessible points within this state; that gravel, an essential part of cement construction, is found in abundance and distributed throughout the different portions of this state, thus making practicable the manufacture of cement and cement products within this state; that there are no privately-owned and operated cement plants within this state or within some 175 miles of the borders thereof; and that the manufacture, distribution, and sale of cement and cement products by the state will tend to promote the public welfare, prosperity, and contentment of all the citizens of the state, and will tend to secure a quality of economic opportunity." 183 N. W. at 652.

It could be said that most of the conditions and findings stated in the quotation above were true in July of 1978 when the policy was reaffirmed by the cement commission. However, to accept those findings as proper, legitimate public concerns allowing states to enter the national marketplace and disrupt the flow of commerce by granting preference to its own citizens will set up a blueprint for states to engage in economic protectionism. The states of Texas and Alaska, with their reserves of oil and gas, or Wyoming and Montana, with their reserves of uranium and coal, could substitute their particular resource into the above findings and isolate themselves from national problems of energy shortages and natural resource shortages. The blueprint set forth in *Eakin v. South Dakota State Cement Commission, et al., supra,* does not meet the general test described in *H. P. Hood & Sons v. DuMond,* 336 U. S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949); and *Pike v. Bruce Church, Inc., supra;* be-

cause it does not seek to insure the health or safety of South Dakota citizens so much as to insure their "economic opportunity". *Eakin,* 183 N. W. at 652. Nor is the purpose to shield the citizens from fraud or immorality so much as it is to "promote the public welfare, prosperity and contentment of all the citizens of the state." *Eakin,* 183 N. W. at 652. This may be a state interest but it cannot be promoted by the state of South Dakota in a fashion which is inconsistent with the Commerce Clause of the United States Constitution.

The restriction sought to be imposed by the cement plant commissioners was not evenhanded because it granted a preference to South Dakota citizens. Obviously, respondents could have adopted an evenhanded allocation program which would have treated all customers the same. Thus, the actions of the South Dakota Cement Commission were not designed to conserve the resource but rather to direct the flow of the resource to the citizens of South Dakota which would have left no surplus cement for out-of-state businesses. The state cannot promote its interests in a way inconsistent with the basic principle that was set forth in *H. P. Hood & Sons, Inc. v. DuMond*:

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, *and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.*" 336 U. S. at 533, 69 S. Ct. at 662 (emphasis supplied).

The "Fifty Percent Allocation" program which was subsequently adopted by the cement plant commission and

found to be unconstitutional under South Dakota law by the Circuit Court of South Dakota may have provided an evenhanded method of distributing the present supply of cement to all consumers within its area.[4] Since an evenhanded distribution was not employed by means available to the State of South Dakota, the state policy adopting the preferential treatment for its own citizens in the distribution of its state-owned products was impermissible under the Commerce Clause. *Pike v. Bruce Church, Inc., supra.*

The Commerce Clause of the United States Constitution protects the rights of out-of-state consumers to go into the State of South Dakota, without restriction or preference for South Dakota customers, and deal in the national marketplace for cement. This principle does not force South Dakota to enter markets it had not previously entered. It does allow out-of-state residents to enter every marketplace in the United States and be treated the same as a citizen of the marketing state. This principle is recognized in *H. P. Hood & Sons v. DuMond, supra,* that:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." 336 U. S., at 539, 69 S. Ct., at 665. (Emphasis supplied.)

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4 See Footnote 3 on page 9.

and in *Baldwin v. G. A. F. Seelig, Inc., supra*:

> "To give entrance to (economic protectionism) would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon a theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032 (1935).

—o—

CONCLUSION

The State of South Dakota has sought to take a different trade route than outlined by our forefathers in the Commerce Clause. The State of South Dakota asserts an unconstitutional claim that it can now remove from the marketplace, for the purpose of giving economic advantage to its residents, the development and sale of a resource which it formerly sold in interstate commerce, even though such action causes obvious harm to the citizens of other states. Such economic isolationism is repugnant to the Commerce Clause of the United States Constitution.

For these reasons, the judgment of the United States Court of Appeals, Eighth Circuit, dated August 7, 1979, should be reversed.

Respectfully submitted,

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APPENDIX A

IN CIRCUIT COURT
SIXTH JUDICIAL CIRUIT

State of South Dakota, County of Hughes, ss.

WILLIAM J. JANKLOW, Attorney General of the State of South Dakota, ex rel.: THE ASSOCIATION OF GENERAL CONTRACTORS OF THE STATE OF SOUTH DAKOTA, INC.,—HIGHWAY HEAVY UTILITIES CHAPTER: and THE ASSOCIATION OF GENERAL CONTRACTORS OF SOUTH DAKOTA, INC.—BUILDING CHAPTER,

Plaintiffs,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG, and DAVE JOHNSON, MEMBERS OF THE SOUTH DAKOTA CEMENT COMMISSION,

Defendants,

and

GENERAL CONSTRUCTION COMPANY,

Intervenor,

and

HEARTLAND CONSUMERS POWER DISTRICT and MISSOURI BASIN MUNICIPAL POWER AGENCY,

Intervenor,

and

REDI-MIX DEALERS ASSOCIATION,

Amicus Curiae.

MEMORANDUM DECISION

This is an action in mandamus and prohibition brought by the South Dakota Attorney General and the Association of General Contractors of the State of South Dakota against the members of the South Dakota Cement Plant Commission (Commission).

Generally stated, the plaintiffs seek to prohibit the Commission from selling cement for projects located outside the State of South Dakota unless all of South Dakota's needs and demands are first met. They further seek mandamus to require the Commission to meet and adopt a policy allocating South Dakota's cement in a manner consistent with the provisions of the South Dakota Constitution and statutes.

Upon an appropriate showing by plaintiffs this Court entered alternative writs of prohibition and mandamus and set the matter for hearing on September 1, 1978. At the hearing various parties, as captioned above, were allowed to intervene. After hearing the eviednce presented this Court continued the alternative writs. For the reasons set forth below these writs will now be made permanent and peremptory writs will issue.

FACTS PRESENTED

The South Dakota Cement Plant is a department of this state's government engaged in the manufacture and marketing of cement. The defendant Commission members are appointed, pursuant to statute, to administer and control the plant and its operations.

Because of a combination of many circumstances the plant was unable to produce sufficient cement to meet its customers' orders. Seemingly the situation became

critical, so on June 1, 1978 the Commission adopted a resolution re-affirming its policy " . . . of supplying all South Dakota consumers first and to honor all contract commitments with the remaining volume (of cement) allocated on a first come, first serve basis."

A Wyoming contractor, Reeves, Inc., which was apparently affected by this policy, obtained an order on July 21, 1978 from the U. S. District Court in Rapid City prohibiting the Commission from applying the aforesaid policy against it (Reeves). Inasmuch as the instant action was commenced subsequent to the federal court order in *Reeves,* all orders issued by this Court have specifically exempted and excluded Reeves from their applicability. It perhaps should be mentioned here that the issues before the Federal District Court in *Reeves* (and the two other cases filed subsequent to this action before that court) are different than the specific issues before this Court. The actions in the Federal District Court are premised on alleged violations by the Commission of the commerce clause and privileges and immunities clause of the United States Constitution (Article I, Section 8 and Article IV, Section 2, cl. 1). Those issues are not before this Court, nor have the South Dakota constitutional issues been placed before the Federal District Court. Therefore the courts and the judges thereof are not "at odds" as it might appear at first blush.

Subsequent to the issuance of the Federal Court order (July 27, 1978) the Commission rescinded its policy of giving first preference to South Dakota customers, as in the stated policy above. In its stead the Commission adopted a policy which allocated the cement under

a "prioritization allocation schedule." Under this schedule first priority was given to all public improvement projects within South Dakota; second priority went to all health care facilities; third priority to all cement plant commitments within and without the state. The remaining balance of cement was then to be allocated on the basis of the customers' average purchases over the prior five years.

On August 5, 1978 the Commission rescinded its July 27 policy and adopted a policy which allocated cement on a "prioritization basis". Under this policy all consumers, be they from South Dakota or elsewhere, would be allowed an amount equal to fifty per cent of the average amount purchased by the particular customer over the last three years. This is the so-called "Fifty Per Cent Allocation Policy" which plaintiffs sought to prohibit the Commission from further implementing. It has been alleged and proven that the cement plant will produce approximately 36,000 tons of cement per month during the remaining construction season, of which 16,000 ton would be shipped to non-South Dakota customers.

At the hearing before this Court on September 1, 1978 several witnesses were called. They supported the position of plaintiffs and explained the individual plights that they were in as the result of the Fifty Per Cent Allocation Policy. It is this Court's opinion that the evidence produced has proven: that most if not all of the 36,000 tons per month of cement produced by the cement plant is currently needed in the State of South Dakota for construction and projects within the State; that cement products are commodities necessary to the

people of this State; that cement is necessary in the construction of innumerable public and private works; that cement use is rapidly increasing in this State; that there is a serious shortage in the supply of cement in this State; that shortages have interfered with both public and private enterprises; that there are no privately owned or operated cement plants within this State; that many construction workers' jobs are dependent upon the ability of South Dakota contractors, government, farmers and ranchers and businesses to obtain cement and that many of such enterprises have cut working hours and/or laid off employees as a direct result of their inability to obtain cement from the South Dakota Cement Plant; that the foregoing has a detrimental effect on the economy of the State of South Dakota and its citizens; that delay in public improvement contracts caused by inability of South Dakota contractors to obtain cement has and will cause economic losses to citizens and taxpayers of this State: that for all of these reasons and others alleged and proven by plaintiffs the citizens of the State of South Dakota will suffer irreparable injury.

At the conclusion of the hearing this Court continued the alternative writs and allowed counsel time to submit briefs. In ordering that the writs be continued the previous exemption for Reeves, Inc. was maintained. In addition an exemption was given to customers under previous contracts with the cement plant.

ISSUE PRESENTED

IS THE CURRENT COMMISSION POLICY (FIFTY PER CENT ALLOCATION POLICY) CONSISTENT WITH THE INTENT OF THE SOUTH DAKOTA CONSTITUTION AND STATUTES?

DECISION

The South Dakota Constitution, Article XIII, Section 10, reads:

> The manufacture, distribution and sale of cement and cement products are hereby declared to be works of public necessity and importance in which the state may engage, and suitable laws may be enacted by the Legislature to empower the state to acquire, by purchase of appropriation, all lands, easements, rights of way, tracts, structures, equipment, cars, motive power, implements, facilities, instrumentalities and material, incident or necessary to carry the provisions of this section into effect: provided, however, that no expenditure of money for the purposes enumerated in this section shall be made, except upon a vote of two-thirds of the members elected of each branch of the Legislature.

The 1919 Legislature in adopting the enabling legislation, provided:

> SDCL 5-17-1 The people having adopted amendments to our state Constitution to the effect that the manufacture, distribution, and sale of cement and cement products are works of public necessity and importance in which the state may engage, it is hereby declared that the manufacture, distribution, and sale of cement and cement products are public purposes impressed with a public use and as such governmental functions subject to regulation by the state.

In addition reference must be made to SDCL 5-17-9 which provides:

> The state cement commission is hereby empowered and authorized to operate the South Dakota state cement plant located at Rapid City, South Dakota, to sell the products produced at said plant, to fix the price of such products and to determine the manner and methods of the terms under which such products shall be sold, to advertise such products to the public in such manner as the commission shall deem proper, and to do all things in the operation of such plant and the sale of its product as the commission may deem necessary or expedient to the successful operation of said plant.

Much helpful historical information was furnished to the Court in plaintiffs' brief. Reference is made to the Report of State Cement Commission, December, 1920 and Governor's (Norbeck) Message to the Special Session of the Legislature, June, 1919.

The South Dakota Supreme Court has heretofore had an occasion to hold that ". . . the manufacture of cement, under the conditions existing in the state of South Dakota, is the carrying out of a public purpose." *Eakin v. South Dakota Cement Commission*, 183 N. W. 651 (1921). In *Eakin* the court specifically found and determined:

> 1. That cement and its products are commodities that are necessary to the people of this state;
>
> 2. [T]hat they cannot be procured through individual effort;
>
> 3. [T]hat, in the construction of highways, bridges, street pavings, sidewalks, and public buildings within this state, cement is a necessary material, and for such construction there are required more than 1,000 barrels of cement per day;

4. [T]hat cement and cement products are also necessary materials for the construction of homes and other structures not hereinbefore referred to;

5. [T]hat the use of cement is rapidly increasing in this state as elsewhere;

6. [T]hat a serious shortage in the supply of cement is threatening the people of this state;

7. [T]hat there has been such a shortage many times during the past two years and at times such shortage has interfered with and delayed both public and private enterprises;

8. [T]hat the materials for the making of cement are found in large quantities and at accessible points within this state;

9. [T]hat gravel, an essential part of cement construction, is found in abundance and distributed throughout the different portions of this state, thus making practicable the manufacture of cement and cement products within this state;

10. [T]hat there are no privately owned and operated cement plants within this state or within some 175 miles of the borders thereof; and

11. [T]hat the manufacture, distribution, and sale of cement and cement products by the state will tend to promote the public welfare, prosperity, and contentment of all the citizens of the state, and will tend to secure equality of economic opportunity.

The circumstances present today with increasing demands for and shortages of cement are not dissimilar to those existing at the time of the creation of the cement plant and the holding in the *Eakin* decision.

In view of *Eakin* and all of the facts and circumstances now present, it is this Court's opinion that the Fifty Per Cent Allocation Policy violates the provisions of the South

Dakota Constitution (Article XIII, Section 10) and SDCL 5-17-1 and 5-17-9. The Commission has abused the discretion given to it by 5-17-9 by allowing nearly fifty per cent of the plant's total production to be shipped out of state, to the detriment of South Dakota citizens and taxpayers.

The evidence is clear that a continuation of the Fifty Per Cent Allocation Policy will cause irreparable harm to the citizens and taxpayers of this State, be they farmers, ranchers, business people, contractors and their employees, or other customers of cement products.

Accordingly, the writs of mandamus and prohibition will be made permanent. The Attorney General is directed to prepare proposed findings of fact, conclusions of law and peremptory writs pursuant to the rules of civil procedure.

Dated this 5th day of October, 1978.

BY THE COURT:

/s/ Robert A. Miller
Presiding Circuit Judge

ATTEST:

.....
Clerk of Courts
(SEAL)

APPENDIX B

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

State of South Dakota, County of Hughes, ss:

WILLIAM J. JANKLOW, Attorney General of the State of South Dakota, ex rel. THE STATE OF SOUTH DAKOTA:

THE ASSOCIATION OF GENERAL CONTRACTORS OF THE STATE OF SOUTH DAKOTA, INC.,—HIGHWAY HEAVY UTILITIES CHAPTER: and THE ASSOCIATION OF GENERAL CONTRACTORS OF SOUTH DAKOTA, INC.,—BUILDING CHAPTER,

Plaintiffs,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG, and DAVE JOHNSON, MEMBERS OF THE SOUTH DAKOTA CEMENT COMMISSION,

Defendants,

and

GENERAL CONSTRUCTION COMPANY,

Intervenor,

and

HEARTLAND CONSUMERS POWER DISTRICT and MISSOURI BASIN MUNICIPAL POWER AGENCY,

Intervenor,

and

REDI-MIX DEALERS ASSOCIATION,

Amicus Curiae.

PERMANENT WRIT OF PROHIBITION
AND
WRIT OF MANDAMUS

Plaintiffs, having commenced an action against the Defendants under SDCL 21-30 for a writ of prohibition and under SDCL 21-29 for a writ of mandamus, and said matter having come on before the court for hearing on September 1, 1978; and Plaintiff State of South Dakota being represented by William J. Janklow and Steven L. Zinter, and Plaintiff Association of General Contractors being represented by Ronald W. Banks, and Defendant Commissioners being represented by Donald R. Shultz, and Intervenor General Construction Company being represented by Gary F. Colwill, and Intervenors Heartland Consumers Power District and Missouri Basin Municipal Power Agency being represented by Vincent J. Protsch, and Amicus Curiae Redi-Mix Dealers Association being represented by George Manolis; and the court after hearing the testimony of the witnesses and the arguments and briefs of counsel, and being fully advised in the premises, and having previously entered its Memorandum Decision of October 5, 1978, and the court having previously issued its Findings of Fact and Conclusions of Law; NOW THEREFORE

IT IS HEREBY ORDERED that this Court's October 5, 1978, Alternative Writs of Prohibition and Mandamus be made permanent, and that YOU, TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG, and DAVE JOHNSON, the members of the South Dakota State Cement Commission are HEREBY COMMANDED:

1. To refrain from implementing the Fifty Percent Allocation Policy or any other policy that (with the exception of Reeves, Inc., a wheeling arrangement, or other than contractual obligations existing on August 28, 1978), would require South Dakota cement produced at the South Dakota Cement Plant from being shipped or sold for use in projects located outside of the State of South Dakota, unless all of South Dakota's demands have first been met.

2. To refrain from selling or shipping any cement produced at the South Dakota Cement Plant to buyers (except for Reeves, Inc., a wheeling arrangement, or contractual obligations existing as of August 28, 1978), for use in projects that are not located within the State of South Dakota unless all of South Dakota's demands have first been met.

3. To meet, and adopt a policy of allocating South Dakota cement in such a manner that, (with the exception of Reeves, Inc., and other than contractual obligations existing as of August 28, 1978), is consistent with the intent of SDCL 5-17-1, 5-17-9, and Article XIII, Section 10 of the Constitution that the State Cement Plant sell and distribute its cement for South Dakota's uses first and that any remaining surplus be distributed and sold in a manner to be decided by the Commission.

Dated at Pierre, South Dakota, this 23rd day of October, 1978.

BY THE COURT:

/s/ Robert A. Miller
Circuit Court Judge

ATTEST:

/s/ Euince Cory
Clerk of Courts

FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1979

—o—

NO. 79-677

—o—

REEVES, INC.,

Petitioner,

vs.

WILLIAM STAKE, RICHARD SAYRE, THOMAS ZELLER, AL SANDVIG, EDWIN GAISER, JOSEPH SIMMONS, ROGER PRUNTY, Members of the South Dakota Cement Plant Commission,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

BRIEF FOR THE RESPONDENTS

—o—

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In The

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OCTOBER TERM, 1979

NO. 79-677

REEVES, INC.,

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WILLIAM STAKE, RICHARD SAYRE, THOMAS ZELLER, AL SANDVIG, EDWIN GAISER, JOSEPH SIMMONS, ROGER PRUNTY, Members of the South Dakota Cement Plant Commission,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 7, 1979 (App. 49).

The petition of Reeves, Inc. for a writ of certiorari was filed on October 25, 1979, and granted on January 14, 1980.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

o

QUESTION PRESENTED

1. Does the State of South Dakota violate the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Clause 3, by participating in the market and exercising the right to favor its own citizens over others in the sale of products manufactured and owned by the State?

o

STATEMENT

In the general election of 1918, the citizens of South Dakota passed a constitutional amendment, Article XIII, Section 10, declaring the manufacture, distribution and sale of cement and cement products to be "works of public necessity and importance in which the state may engage" and authorizing the State legislature to expend State funds to acquire lands, equipment and facilities necessary to the establishment of a cement manufacturing plant. The 1919 South Dakota legislature adopted the enabling legislation creating the South Dakota Cement Commission. *South Dakota Compiled Laws* 5-17-1 et seq. The Respondents are the present members of that Commission.

The impetus behind the original establishment of the South Dakota Cement Plant in the early 1920's was the

critical shortage of cement within the State. There existed no private cement manufacturer in the State, resulting in a cement shortage interfering with both private and public projects in South Dakota.[1]

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1 The conditions that existed in South Dakota prompting the State to establish the South Dakota Cement Plant were delineated by the South Dakota Supreme Court in *Eakin v. South Dakota State Cement Commission,* 44 S. D. 268, 183 N. W. 651, 652 (1921), wherein the Court upheld the enabling legislation against a state taxpayer's due process challenge. The Court's opinion included the following findings:

[1] That cement and its products are commodities that are necessary *to the people of this state;* that they cannot be procured through individual effort.

[2] that, in the construction of highways, bridges, street paving, sidewalks, and public buildings *within this state,* cement is a necessary material, and for such construction there are required more than 1,000 barrels of cement per day; that cement and cement products are also necessary materials for the construction of homes and other structures not hereinbefore referred to,

[3] that the use of cement is rapidly increasing *in this state as elsewhere;* that a serious shortage in the supply of cement is threatening *the people of this state;* that there has been such a shortage many times during the past two years and at times such shortage has interfered with and delayed both public and private enterprises;

[4] that the materials for the making of cement are found in large quantities and at accessible points *within this state;* that gravel, an essential part of cement construction, is found in abundance and distributed throughout the different portions *of this state,* thus making practicable the manufacture of cement and cement products *within this state;*

[5] that there are no privately owned and operated cement plants *within this state* or within some 175 miles of the borders thereof; and

[6] that the manufacture, distribution and sale of cement and cement products by the state will tend to promote the public welfare, prosperity, and contentment *of all the citizens of the state,* and will tend to secure equality of economic opportunity. [Emphasis supplied.]

While the cement plant was originally established for the express purpose of relieving the critical cement shortage within the State of South Dakota, it was soon recognized that there existed a ready market for any surplus supply in neighboring states.[2] Consequently, since the construction of the plant in 1920, the State has practiced a sales policy whereby the needs of South Dakota citizens would be met first with the surplus sold to out of State purchasers.

Prior to 1978 South Dakota was able to meet the South Dakota demand as well as selling the surplus out of State. During 1978, however, the demand for cement in South Dakota, together with contractual commitments outside the State and production problems at the plant itself, resulted in a period of unprecedented demand on the plant's capacity. By June 1, 1978, it became apparent that the public and private demands for cement in South Dakota would exceed the plant's capacity (App. 30-34). The State was thus faced with the same cement shortage situation that caused it to establish the plant in 1920. The public purpose for which the cement plant was originally created, that is, to manufacture and sell cement to the citizens of South Dakota, was recognized by the Commission. This public purpose dictated and prompted the Commission to reaffirm its longstanding policy of first

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2 The 1920 report of the State Cement Commission to the Governor stated:

> "That there would be a ready market for the entire output of the State within the State.
>
> That in case there is a surplus, a ready market is available in adjoining states." (App. 31)

supplying South Dakota customers and existing contractual purchasers, both resident and nonresident, with any remaining volume allocated on a first come, first served basis[3] (App. 13).

Reeves, Inc. is a Wyoming corporation which has purchased cement from the South Dakota Cement Plant since 1958. Reeves, Inc. did not have a contractual commitment with the cement plant in 1978 and therefore the cement plant was unable to supply Reeves, Inc. during that year in accordance with the sales policy reaffirmed by the Cement Commission on June 1, 1978. On July 19, 1978 Reeves, Inc. filed suit against the Commission in the United States District Court for the District of South Dakota seeking declaratory and injunctive relief (App. 3-10). On July 21, 1978, the District Court entered an order permanently enjoining the South Dakota Cement Commission from using a policy that would prohibit the sale of cement to Reeves, Inc. solely because the corporation is not an entity within the State of South Dakota. The District Court declared such a policy with respect to Reeves, Inc. to be a violation of the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution (App. 27-30).

In response to the District Court's decision, the Commission adopted a "priortization" policy whereby both resident and nonresident purchasers were supplied based on past usage. Implementation of this policy or any other policy requiring out-of-state sales before the needs of

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3 This same policy had been expressed at a previous meeting of the South Dakota Cement Commission on June 26, 1974. (App. 24-25)

South Dakota purchasers were met was, except as to Reeves, Inc., enjoined by order of the Circuit Court of the Sixth Judicial Circuit of South Dakota as violative of the constitution and laws of the State of South Dakota (See Appendix A and B to Petitioner's brief). Thereafter, other nonresident purchasers filed suit in United States District Court and were granted injunctive relief similar to that granted Reeves, Inc. *Russell's Ready Mix, Inc. v. Kelley, et al.*, No. 78-5073 (D. S. D. Sept. 28, 1978), and *Mullinax Concrete Service Co. v. Kelley, et al.*, No. 78-5074 (D. S. D. Sept. 22, 1978).

On appeal to the Eighth Circuit Court of Appeals, these cases were consolidated with *Reeves, Inc. v. Kelley, et al.* for argument and decision. The Court of Appeals reversed the District Court, holding that the Commerce Clause does not prohibit South Dakota from participating in the market and exercising the right to favor its own citizens over others. *Reeves, et al. v. Kelley, et al.*, 586 F. 2d 1230 (8th Cir. 1978) (App. 35-41). The injunctive relief granted by the District Court was vacated and the Petitioner's claim was dismissed for failure to state a claim for relief (App. 42-43).

A Petition for Writ of Certiorari on behalf of Reeves, Inc. was filed in the Supreme Court of the United States. On May 14, 1979 the Supreme Court entered an order granting the Petition for Writ of Certiorari, vacating the judgment of the Court of Appeals, and remanding the case to the Court of Appeals for further consideration in light of *Hughes v. Oklahoma*, 441 U. S. 322, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979); *Reeves, Inc. v. Kelley*, 441 U. S. 939, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979) (App. 43).

In its opinion on remand, the Eighth Circuit Court of Appeals carefully considered the Supreme Court's decision in *Hughes v. Oklahoma*, supra. The Court of Appeals discerned significant differences between the cases. *Hughes v. Oklahoma* dealt with a direct State attempt to restrict the out-of-State sale of a natural resource after it had been reduced to private possession. In contrast, the State of South Dakota made no attempt to regulate or control the private sale of cement. Basing its decision on this fundamental distinction between the types of activity the Commerce Clause was intended to restrict, the Court of Appeals abided by its previous holding that the Commerce Clause does not prohibit South Dakota "from participating in the market and exercising the right to favor its citizens over others." *Hughes v. Alexandria Scrap*, 426 U. S. 794, 810, 96 S. Ct. 2488, 49 L. Ed. 2d 220; *Reeves v. Kelley*, 603 F. 2d 736 (8th Cir. 1979) (App. 44-48).

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SUMMARY OF ARGUMENT

I.

This case presents a Commerce Clause challenge to a State action unlike that presented in most previous Commerce Clause controversies. South Dakota has not attempted to usurp federal regulatory powers or enact legislation regulating interstate commerce in cement. Rather, South Dakota entered the market as a seller of a State manufactured product and, at a time when it could not meet the demands of all of its past customers, chose to limit its sales to South Dakota residents.

In *Hughes v. Alexandria Scrap Corp.,* 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976), the Supreme Court established the principle that a State acting as a participant, as distinguished from a regulator, in the marketplace, is not restrained by the negative implications of the Commerce Clause from favoring its own citizens. The decision reached in *Hughes v. Alexandria Scrap,* supra, is based upon the fundamental distinction between the type of State activity involved. When a State regulates the general citizenry in the marketing of privately owned commodities in trade, it is subject to Commerce Clause review to assure that the State does not enact legislation tending to unduly inhibit trade between citizens of different States. However, when a State is carrying out its own business, rather than regulating the business of others, the State as a buyer or seller of its own product is subject to no greater Commerce Clause review than private citizens engaged in similar conduct.

This distinction between the types of State activity with which the Commerce Clause is concerned is founded upon the historical purposes of the Commerce Clause itself. The Clause was directed at the regulatory and taxing authority of States. The Clause was never intended to withdraw from the States the power to distribute State owned assets in a fashion that it deems appropriate.

The activity of South Dakota may be properly viewed as creating new commerce, rather than restricting existing commerce. The very commerce that is now claimed to be burdened would not have existed had not South Dakota originally elected to become a manufacturer and seller of cement. Petitioner has chosen over the years to purchase nearly all of its cement requirements from South Dakota.

However, Petitioner's status as a long-standing customer does not ripen into a constitutional right to purchase whenever South Dakota lacks a supply of cement to meet all available demand.

The precedents relied upon by the Petitioner are inapplicable to the type of State action involved in the present case. In each of the cases cited by the Petitioner, the State has acted either directly or indirectly as a regulator of the general public in the marketing of products in interstate commerce. In the present case South Dakota is acting in a proprietary capacity as a Seller of a product in the marketplace. South Dakota makes no attempt to regulate the conduct of those with whom it deals.

II.

The decision in *Hughes v. Oklahoma,* 441 U. S. 332, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979) does not represent a departure by the Court from its previous holding in *Hughes v. Alexandria Scrap Corp.,* supra. In *Hughes v. Oklahoma,* supra, Oklahoma restricted the out-of-state sale of wildlife that had been reduced to private possession and ownership. The Court rejected as a legal fiction the notion that a State maintains an ownership interest in wildlife after it comes into private hands such that the State could limit its sales to residents. In the present case, South Dakota's ownership of its own manufactured product is based on simple fact, not legal fiction. South Dakota has not attempted to assert that through some legal fiction its ownership interest in cement continues after the product comes into private possession such that it could thereafter prohibit cement sales to nonresidents. Rather South Dakota maintains that in the absence of con-

gressional action, the Commerce Clause does not prohibit the State from favoring its own citizens in the sale of its own product.

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ARGUMENT

I.

The State of South Dakota does not violate the Commerce Clause by participating in the market and favoring its citizens over others in the sale of its own manufactured product.

This case involves the nature of Commerce Clause limitations on the right of a State to favor its own citizens over citizens of other States in the sale of a State-owned and manufactured product. It is necessary at the outset to clearly identify the type of State activity involved. South Dakota has not attempted to pass any regulation or prohibition on any private industry functioning in commerce. Neither has South Dakota attempted to interfere with or usurp federal regulatory power. Rather, this Court is presented with a factual situation unlike most previous Commerce Clause controversies. In the present case, the Commerce Clause challenge is to a State which as a manufacturer-seller faced with production demands it could not meet, made an administrative decision to follow a sales policy that gave priority to meeting the demands of South Dakota customers. Thus the issue posed is what restraints, if any, are imposed by the Commerce Clause on a State's right to favor its own

citizens in the sale of its own manufactured products, in the absence of any conflicting federal legislation.

Previous decisions of this Court has established the principle that a State acting as a participant, as distinguished from a regulator, in the marketplace, is not restrained by the negative implications of the Commerce Clause from favoring its own citizens. In *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976), this Court rejected the argument advanced by the Petitioner herein that every action of a State that may have an effect on interstate commerce is subject to Commerce Clause review, stating:

> "This line of reasoning is not without force if its basic premise is accepted. That premise is that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden. But we are not persuaded that Maryland's action in amending its statute was the kind of action which the Commerce Clause is concerned." 426 U. S. at 805, 96 S. Ct. at 2495, 49 L. Ed. 2d at 228-29.

The Supreme Court in *Hughes v. Alexandria Scrap, Corp.*, supra, reviewed the same cases relied upon by the Petitioner herein and concluded that "[t]he common thread of all of these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." 426 U. S. at 806, 96 S. Ct. at 2496, 49 L. Ed. 2d at 229. The Court then drew a clear distinction between the historical evils the Commerce Clause was designed to prevent and the type of State action presented in the case then before it:

> "But until today the Court has not been asked to hold that the entry by the State itself into the

market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

We do not believe the Commerce Clause was intended to require independent justification for such action." 426 U. S. at 808-09, 96 S. Ct. at 2497, 49 L. Ed. 2d at 230-31.

The decision in *Hughes v. Alexandria Scrap,* supra, bears directly upon the issues presented in this case.[4] The Court drew a sharp distinction between two types of State activity affecting interstate commerce. In the first type, the State through its rulemaking powers enacts legislation aimed at regulating private conduct in the marketplace. In the second type of State activity, the State directly enters the market as a participant to buy or sell goods and services in the marketplace. The Court concluded that the first type of activity was properly the subject of Commerce Clause review, while the second type of State activity was not the type of conduct to which the restraints of the Commerce Clause have been historically directed. By applying this fundamental distinction to the present case, it becomes apparent that South Dakota has not exercised its governmental powers to restrict commerce, but rather has acted in a purely proprietary capacity as a seller in the marketplace, and in such capacity is not subject to Commerce Clause review.

4 While the state of Maryland acted as a purchaser in *Hughes v. Alexandria Scrap,* supra, and here South Dakota is acting as a seller, the distinction is not significant since, as noted by the court below, the holding in *Hughes v. Alexandria Scrap,* supra, was based upon the distinction between a state's participation in and regulation of the market, not upon whether the commerce was moving in or out of a state. *Reeves v. Kelley,* 586 F. 2d 1230, 1233, n. 4 (8th Cir. 1978); *Hughes v. Alexandria Scrap,* supra, 426 U. S. at 808, n. 17.

The Supreme Court had earlier affirmed, in a memorandum opinion, a district court decision based expressly upon this distinction between proprietary and governmental activities. In *American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla. 1972), *aff'd mem.,* 409 U. S. 904, 93 S. Ct. 230, 34 L. Ed. 2d 168 (1972), the Court upheld the constitutionality of a Florida statute that required all public printing of the State of Florida to be done in Florida. The district court stated that differing standards of constitutional review were applicable to "an exercise of a state's proprietary power, such as placing conditions on its own public contracts, and an exercise of governmental power such as a regulation of private industry by placing limitations on private contracts." *American Yearbook v. Askew,* supra, 339 F. Supp. at 722. The Court stated that while Commerce Clause restrictions were applicable to a State's governmental activities, proprietary activity was excluded from such review since when a State acts in a proprietary capacity, "it is subject to no more limitation than a private individual or corporation would be transacting the same business." *American Yearbook v. Askew,* supra, 339 F. Supp. at 721.

Central to the result reached in both *Hughes v. Alexandria Scrap,* supra, and *American Yearbook v. Askew,* supra, was this Court's determination that a State's participation in the market was not "a burden which the Commerce Clause was intended to make suspect." *Hughes v. Alexandria Scrap,* supra, 426 U. S. at 807. This determination was based upon the recognition that histori-

cally the Commerce Clause has been directed only at the regulatory or taxing activities of a State while acting in a sovereign capacity. The Commerce Clause was intended to prevent States from enacting retaliatory legislation that would interfere with the ability of willing parties to contract in interstate commerce. The Commerce Clause was never intended as a constraint upon the ability of an individual or of a State itself to freely enter the marketplace to contract with any party it so chooses on mutually acceptable terms. "Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.,* supra, 426 U. S. at 810. Explicit in this language of the Court is the recognition that the Commerce Clause is a constitutional restriction on the governmental activities of a State as distinguished from its proprietary functions. A State's determination as to whom and under what conditions it will sell its own manufactured product is an essential attribute of a State's sovereignty and fiscal autonomy not subject to Commerce Clause review. The framers of our Constitution did not intend to destroy all special relations between a State and its citizens, but rather to prevent a State from exercising control over the channels of interstate commerce. *Toomer v. Witsell,* 334 U. S. 385, 408-409, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948) (Frankfurter, J. concurring). One of the most basic characteristics of State sovereignty is that a State may limit its largesse to those persons who reside within its borders. The Commerce Clause has never required a State to open its treasury, sell its products, or extend its services on an equal

basis to both residents and nonresidents alike. To do so would undermine the concept of a State sovereignty that is a basic underpinning of our concept of federalism. The purpose of the Commerce Clause has always been to prevent the erection of trade barriers between States, rather than to impose a constitutional restriction on a State's ability to distribute its assets to its citizens.

The concurring opinion of Justice Stevens in *Hughes v. Alexandria Scrap,* supra, 426 U. S. 794 at 814-17, noted that earlier decisions of the Court concerning the Commerce Clause dealt with State activity which interfered with the natural operation of pre-existing commerce, while *Hughes v. Alexandria Scrap* presented a situation in which the State activity created new commerce. Justice Stevens reasoned that the Commerce Clause was intended to proscribe State interference in existing commerce, not State activity giving rise to new commerce. The Justice concluded:

> "I believe, a common and correct interpretation of the Commerce Clause as primarily intended (at least when Congress has not spoken) to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide a basis for questioning a State's right to experiment with different incentives to business." *Hughes v. Alexandria Scrap,* supra, at 426 U. S. 817.

Viewed in the perspective of Justice Stevens' concurring opinion, South Dakota, by entering the cement market, is creating new commerce, not restricting existing commerce. That commerce which is now claimed to be burdened, would never have existed in the first instance if South Dakota had not deemed it necessary to manufacture

and sell cement. South Dakota did not originally enter the cement market in 1920 with any discriminatory motive. The State's novel experiment in cement manufacturing was a direct State response to a critical economic problem within the State at a time when private initiative to meet the problem was lacking. *Eakin v. South Dakota Cement Commission,* 44 S. D. 268, 183 N. W. 651 (1921).

No decision of this Court has ever suggested that a State acting in a proprietary capacity in the marketplace is subject to greater Commerce Clause scrutiny in its actions than a private business acting in a similar capacity. Indeed prior decisions of this Court have held that a State, like any private individual, enjoys the right to determine those with whom it will deal and fix the terms under which it buys and sells in the marketplace. *Perkins v. Lukens Steel,* 310 U. S. 113, 117, 60 S. Ct. 869, 84 L. Ed. 206 (1940); *Atkins v. Kansas,* 191 U. S. 207, 24 S. Ct. 194, 48 L. Ed. 148 (1903); *see also American Yearbook v. Askew,* 339 F. Supp. 719, 721 (M. D. Fla. 1972), *aff'd mem.,* 409 U. S. 904 (1972). The South Dakota Cement Plant functions much like any of its private competitors except that it is directed by an appointed commission rather than a board of directors and its profits are paid to the State's citizens through general treasury rather than to private shareholders. *South Dakota Compiled Laws* 5-17-1 *et seq.* Nothing in the inherent structure of the South Dakota Cement Plant would lend support to the conclusion that any of its marketing decisions would be subject to Commerce Clause review to a greater extent than that of its private corporate competitors. Absent any anticompetitive motives, a private corporation is free to restrict its sales market and to choose its own customers. The Commerce

Clause grants no constitutionally guaranteed right to purchase from a State any more than it grants any similar guaranteed right to purchase from a private corporation. Both the proprietary activities of a State and acts of private parties are subject to the congressional power to regulate commerce, *National League of Cities v. Usery,* 426 U. S. 833, 853, n. 18, 96 S. Ct. 2465, 2475, 49 L. Ed. 2d 245, 259 (1976); *United States v. California,* 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936), neither requires independent justification under the Commerce Clause of the manner in which each selects to sell its own products in the absence of congressional action.

Petitioner maintains that this Court must subject South Dakota's activities to Commerce Clause review because of the adverse effect the State's actions have had upon Petitioner's business. The same argument was advanced by the Virginia scrap processor in *Hughes v. Alexandria Scrap Corp.,* supra. The Court answered this argument by concluding that not every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is an action to which the Commerce Clause is concerned. It is also important to recognize that in the particular factual context of this case that the adverse impact caused Petitioner by South Dakota's action was as much the result of Petitioner's own business decision to purchase the bulk of its cement requirements from South Dakota rather than developing alternative sources of supply. Over the years Petitioner had, through its own choosing, relied on South Dakota to meet nearly all of its cement needs (App. 15). Petitioner's longstanding practice of purchasing from South Dakota does not somehow ripen into a constitutional right

to purchase when South Dakota can no longer produce enough cement to meet even the demands of its South Dakota customers. Certainly the Petitioner could not be heard to raise constitutional objections if other private suppliers found themselves unable to sell to the Petitioner. The result should not be different merely because South Dakota had sold to the Petitioner in the past.

Petitioner asserts that to apply the principles of *Hughes v. Alexandria Scrap Corp.*, supra, to this case, thereby allowing States to favor their own citizens in selling State-owned products, would materially disturb the federal free trade unit intended by the Constitution. As previously stated, a State acting in a proprietary capacity is still subject to the federal power to regulate commerce. *National League of Cities v. Usery*, 426 U. S. 833, 853, n. 18, 96 S. Ct. 2465, 2475, 49 L. Ed. 2d 245, 249 (1976); *United States v. California*, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 67 (1936). Whether it would be wise national policy to allow States to discriminate in favor of their own citizens in the sale of certain State-owned resources, is a question properly presented to Congress. Congress has not elected to regulate interstate commerce in cement. Thus the only question presented here is whether the Commerce Clause standing alone, in the absence of Congressional action, limits the right of a State to favor its citizens in the sale of its own manufactured product.

Far more troubling consequences would arise from the adoption of the Petitioner's interpretation of the Commerce Clause. Such a rule would make every decision of a State subject to an "*ad hoc* measurement of its affect on interstate commerce [that] would unduly interfere with state proprietary functions if not bring them to a standstill." *American Yearbook v. Askew*, 339 F. Supp. 719, 725, *aff'd mem.*, 409 U. S. 904. *See also* Note, 80 Harv. L. Rev. 1357, 1360-61. Courts would be required to examine a State's every purchasing, sales, pricing, employment or advertising decision, among many others, to assure that no resident bias was present; a particularly difficult task in an age of increasingly complex commercial transactions. Such an interpretation of the Commerce Clause would impair the special relationship that has always existed between a State and its citizens in the distribution of State assets and bring about a result unintended by the framers of our Constitution.

Finally, it is necessary to examine the precedents cited by the Petitioner to determine if these decisions lend any support to the interpretation of the Commerce Clause urged by the Petitioner. The Petitioner relies on a series of decisions of this Court from *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911) to *Raymond Motors Transport, Inc. v. Rice*, 434 U. S. 429, 98 S. Ct. 787, 54 L. Ed. 2d 664 (1978) where this Court struck down State attempts to either directly or indirectly interfere with the private channels of interstate commerce. All of these cases relied upon by the Petitioner address the specific prohibition that a State shall not restrict a private citizen in the interstate marketing of his property. No case relied upon by the Petitioner holds that a State is regulating commerce when it sells its own manufactured product.

The Petitioner argues that the action of South Dakota in the present case is one of the clear examples referred to by this Court in *City of Philadelphia v. New Jersey*,

437 U. S. 617, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978) as being per se invalid. In *City of Philadelphia v. New Jersey,* supra, the State of New Jersey passed a law prohibiting the importation into the State of most solid or liquid wastes that originated outside New Jersey. Applying the test outlined in *Pike v. Bruce Church, Inc.,* 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), this Court held that New Jersey could not prevent the shipment of privately owned articles of trade in interstate commerce. Significantly, the Court holding was expressly restricted to commerce in privately owned articles of trade. The Court observed:

> "We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state owned resources. . . ." [citations omitted] 437 U. S. at 627, n. 6.

Petitioner also relies on *Hicklin v. Orbeck,* 437 U. S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), which presented a challenge to the "Alaska Hire" law under the Privileges and Immunities Clause. The Court stated that a State's ownership of property with which a statute is concerned is often "the crucial factor" to be considered in determining whether the Privileges and Immunities Clause is violated. *Hicklin v. Orbeck,* supra, 437 U. S. at 529. The Court found that the Clause was violated because "Alaska had little or no *proprietary interest* in much of the activity swept within the ambit of Alaska Hire;" and that therefore the act went "far beyond the degree of resident bias Alaska's ownership of oil and gas can justifiably support." *Hicklin v. Orbeck,* supra, 437 U. S. at 529 and 534. (Emphasis supplied.) Alaska had attempted to use its ownership of gas and oil as a basis

to act as more than a mere participant in the market, but as a regulator of the employment practices of all private parties with whom the State contracted. By contrast, the nature of South Dakota's proprietary interest in its cement is clear and is based on ordinary property law concepts. South Dakota makes no attempt to use its ownership of cement to regulate the employment practices or any other conduct of any of the parties with which it deals. Unlike Alaska, South Dakota acts as a participant in the market, not as a regulator of private conduct of its customers.

II.

The decision of this Court in Hughes v. Oklahoma is not decisive of the issue presented in this case.

In light of this Court's remand of this case to the Eighth Circuit Court of Appeals for further consideration in light of *Hughes v. Oklahoma,* 441 U. S. 322, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979), it is necessary to discuss this recent Commerce Clause decision in greater detail.[5] *Hughes v. Oklahoma,* supra, involved an Oklahoma statute wihch prohibited the transportation or shipment of natural minnows seined or procured from Oklahoma waters for sale outside the State of Oklahoma. Hughes was convicted of violating the Oklahoma statute by tran-

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5 *See also* W. Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources,* 1979 Sup. Ct. Rev. 51 (1980). The author also focuses his discussion on the issue of the application of the Commerce Clause to State-owned resources as presented in this case. See Hellerstein, at 73-84.

sporting the minnows he had purchased from an Oklahoma dealer to his place of business in Texas. On appeal to the United States Supreme Court, the Court was squarely presented with the issue of whether a State indeed "owned" all wild animals within the State such that it could constitutionally control and regulate not only the taking of game within its borders, but more broadly, the control and regulation of game that had been lawfully reduced to private possession. Thus the central issue before the Court in *Hughes v. Oklahoma,* supra, was whether the State could legitimately claim an ownership interest in wild game after its possession by private citizens.

In deciding this issue the Supreme Court was confronted with a long line of seemingly conflicting precedents. The foremost early decision was *Geer v. Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896). In *Geer,* supra, the Supreme Court considered a State statute that forbade the transportation beyond the State of birds that had been lawfully killed within the State. The Court's majority opinion upholding the statute rested upon a conviction grounded in early common law that the State owned all wild animals within its borders in common with its citizens. It followed then that this continued State ownership "imports the right to keep the property if the sovereign so chooses, always within its jurisdiction for every purpose." *Geer,* supra, at 161 U. S. 530.

Faced with this clear pronouncement of State ownership, the Supreme Court in *Hughes v. Oklahoma,* supra, next proceeded to examine its subsequent decisions. The Court noted that each subsequent decision eroded the *Geer* analysis to the point of virtual extinction. The Court then

concluded that the *Geer* analysis had not stood the test of time and therefore expressly overruled it. The "ownership" language in *Geer* and earlier cases was termed a 19th Century legal fiction. The Court stated that challenges under the Commerce Clause of State regulation of wildlife stand on the same footing as challenges to State regulations of other natural resources. The Court's holding was succinctly stated in the last sentence of the majority opinion, citing the dissenting opinion of Justice Field in *Geer,* supra, that "when a wild animal becomes an article of commerce . . . its use cannot be limited to the citizens of one state to the exclusion of citizens of another state." *Geer,* supra at 161 U. S. at 538 (Field, J. dissenting).

Thus *Hughes v. Oklahoma,* supra, clearly stands for the proposition that a State may no longer attempt to claim a special ownership interest in wild game held by citizens within its borders. The legal fiction of State ownership in wild animals lawfully killed and reduced to private possession is discarded. Once wild game rests in private hands, the State's scope of permissible regulations under the Commerce Clause is only the same as that permissible under precedents governing all other types of commerce. See e. g., *Pike v. Bruce Church,* 397 U. S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

A proper examination of the facts of *Hughes v. Oklahoma,* supra, reveals that this decision does not represent a departure by the Supreme Court from its earlier decision in *Hughes v. Alexandria Scrap Corp.,* supra. *Hughes v. Oklahoma* dealt with a direct State attempt to regulate a natural resource of a State after it had been re-

duced to private possession. A fundamentally different type of State activity is involved in the present case. The State of South Dakota is acting in a purely proprietary capacity in participating in the market through the sale of its own manufactured product.

The dominant issue facing the Supreme Court in *Hughes v. Oklahoma,* supra, was whether or not a State could still lay claim to an ownership interest in wildlife within its border after the game had come into private hands. The significance of the case lies in the fact that the Supreme Court abandoned the legal fiction of such State ownership. In the present case there is no issue of ownership. The State of South Dakota relies on simple fact, not legal fiction, to claim an ownership interest in its own manufactured product. Its ownership of cement is based on conventional property law concepts, not upon a contrived legal fiction. Similarly, South Dakota has not maintained that through some legal fiction its ownership interest in cement continues after the product comes into the possession of private parties such that it could thereafter prohibit sales to nonresidents. South Dakota did not restrict the private sale of cement by South Dakota residents to nonresident buyers. Rather, South Dakota maintains that until the State sells its product, thereby surrendering its ownership interest, the State is free to restrict its own sales in accordance with the legislative mandate of its creation and the Constitution of the State of South Dakota.

The holding of the Supreme Court in *Hughes v. Oklahoma,* supra, is supportive of South Dakota's position in the present case. The precise holding of *Hughes v. Oklahoma* was stated by the Court in the final sentence of the majority opinion wherein the Court quoted the dissenting opinion in *Geer v. Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896), wherein Justice Field stated:

> "*When* any animal, whether living in the waters of the state or in the air above, is lawfully killed for the purpose of food or other uses of man, it *becomes an article of commerce* and its use cannot be limited to the citizens of one state to the exclusion of citizens of another state." *Geer v. Connecticut,* supra, at 161 U. S. 538. (Emphasis supplied.)

Thus *Hughes v. Oklahoma* stands for the proposition that *when* a natural resource such as wildlife comes into private hands it becomes an *article of commerce* and a State may not limit its use to its own citizens to the exclusion of nonresidents. The Court of Appeals decision below is entirely consistent with his holding. South Dakota in the exercise of its property rights in its own manufactured product may choose to sell to its own citizens before selling to nonresidents in accordance with the public purpose for which it was created. *When* its product has been sold, however, it becomes an *article of commerce* and the State of South Dakota could not thereafter restrict its movement in interstate commerce.

CONCLUSION

The Eighth Circuit Court of Appeals correctly held that the Commerce Clause does not limit the State of South Dakota's power to choose whether, to whom, and on what conditions it sells its State-owned and manufac-

tured cement. The decision is in accord with the previous decisions of this Court in *Hughes v. Alexandria Scrap Corp.*, supra, and *Hughes v. Oklahoma,* supra.

It is therefore respectfully submitted that the decision of the Eighth Circuit Court of Appeals be affirmed.

March, 1980.

Respectfully submitted,

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